Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–19 OF 2006(W) AND 02—20 OF 2006 (W)
AHMAD FAIRUZ CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH & SARAWAK), ABDUL HAMID MOHAMAD, ALAUDDIN AND NIK HASHIM FCJJ
19 JULY 2007

Administrative Law — Exercise of judicial functions — Bias — Test of real danger of bias — Whether adverse remarks/findings showed a real danger of bias — Principles applicable

Civil Procedure — Judge — Judgment affecting right of person not party to action — Application by third parties to intervene and to have offensive statements in judgments expunged

Civil Procedure — Judgments and orders — Written judgment — Application to expunge offensive statements in the judgments — Whether adverse remarks/findings showed a real danger of bias

Contract — Formation — Terms — Whether compensation formula in a contract a penalty or a debt — Contracts Act 1950 s 75

Fawziah Holdings Sdn Bhd ('Fawziah Holdings') sued Metramac Corporation Sdn Bhd ('Metramac Corporation') principally for damages for breach of contract in the High Court of Kuala Lumpur. Fawziah Holdings ('the respondent') claimed against Metramac Corporation ('the appellant') damages and compensation alleging breach of the terms of the signage sub-licence agreement and the signage sub-licence amending agreement for terminating them and by giving the signage and advertising rights to third parties. In its claim for compensation the respondent relied on the formula under clause 8 of the signage sub-licence agreement to calculate the amount of compensation payable where it was stipulated that in the event of termination of the first concession agreement by either the appellant or DBKL the appellant would have to pay the respondent a compensation in the sum of RM7,797,000 per annum from 1991 to 2000 less 8% discount per annum and the same would be payable from any compensation received from DBKL. The respondent further pleaded that the sum of RM405 millions received by the appellant from DBKL was in fact compensation sum. Hence the appellant was holding it on trust and for the benefit of the respondent. The appellant denied that the sum received was held under trust and countered that the said sum was a subsidy paid by the Government through

DBKL for the completion of the project. The High Court allowed part of the claim of Fawziah Holdings and dismissed the others. Both Fawziah Holdings and Metramac Corporation appealed against the High Court judgment to the Court of Appeal. The Court of Appeal allowed Fawziah Holdings' appeal but dismissed Metramac Corporation's appeal. Metramac Corporation applied for leave to appeal to the Federal Court against both the judgments. The judgment of the court of appeal, in particular, the judgment of Gopal Sri Ram JCA contained statements against Tun Daim and Tan Sri Halim Saad which they found to be objectionable. Tun Daim and Tan Sri Halim Saad were neither parties nor witnesses in the suit in the High Court or in the appeals in the court of appeal. They each filed an application to intervene in Metramac Corporation's applications for leave to appeal and to have the offensive statements expunged. Leave to appeal was obtained which involved three questions posed for the determination of the court, namely: (a) whether the creation of a trust by a company amounts to an illegal reduction of its capital?; (b) whether the test adopted by the Court of Appeal, in determining whether clause 8 of the signage agreement was a stipulation by way of a penalty and/or a sum named in the contract for purposes of s 75 of the Contracts Act 1950, was the correct test and/or was exhaustive?; (c) whether the Court of Appeal's adverse remarks/findings in the circumstances of the case, when viewed objectively, showed a real danger of bias on the part of the court of appeal in the judgment arrived at against the appellant? Leave to intervene was also granted to the interveners.

Held, setting aside the decision and judgments of the Court of Appeal and affirming the finding of liability of the appellant by High Court:

(1) (per **Richard Malanjum CJ (Sabah & Sarawak)**) The stage at which bias was said to have arisen was quite immaterial. The real danger of bias could arise at any stage in a judicial or quasi-judicial proceeding or even in administrative tribunal. The crucial point in determining the presence of bias was to objectively enquire whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test for real danger of bias as formulated by this court. In other words the enquiry was to determine whether there was 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate between two or more parties; he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute.' — per Lord Thankerton in the English case of *Franklin v Minister of Town & Country Planning* [1948] AC 87 (see para 70).

(2) (per **Richard Malanjum CJ (Sabah & Sarawak)**) The main judgment declared that 'a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.' There were also the concluding statements made in the main judgment noting that greater care was taken in examining the findings of the lower court and 'have very carefully scrutinised the disclosure documents. I have read them again and again'. The court was of the view that these declarations were not magical mantras that would preclude further scrutiny. Those remarks and findings were

directed not only against the appellant but also against certain personalities who were not parties to the suit. In short the nett effect of the remarks and findings by the court of appeal was that the actions or behaviour of those persons mentioned amounted to economic duress against the former shareholders of the appellant, patronage and abuse of governmental powers and positions for personal gains of some persons in complete disregard to taxpayers' money, misappropriation of funds bordering on criminal breach of trust and the making of wild allegations against the respondent (see paras 85–86).

(3) (per **Richard Malanjum CJ (Sabah & Sarawak)**) Correspondences exchanged did not also portray an abuser-victim situation. The other previous shareholders of the appellant were not mere country yokels. They were experienced corporate personalities and established statutory bodies such as Tabung Haji. In fact the other previous shareholders of the appellant were not even parties to the suit. Surely there would have been avalanche of protests written if they had been oppressed. Subsequent payments made by the federal government and DBKL were given with explanations. But the way the court of appeal in the main judgment put it was as though those payments were dished out without any sense of accountability and according to the whims and fancies of the then Minister of Finance (see para 89).

(4) (per **Richard Malanjum CJ (Sabah & Sarawak)**) A plain private claim for breaches of contract and express trust was turned into a kind of public interest litigation by the learned judges of the court of appeal without much push from the respondent. The allegations in the main judgment of patronage, abuse of power and economic duress could only have come from the allegations inter alia of 'pressure to sell' the shares, receipt of 'instruction' from Tun Daim and Metro Juara 'not foolish in offering' made in the submissions of counsel for the respondent in the court of appeal and not as pleaded by the respondent. The basic principle of law that a party is bound by its pleadings was ignored. The proper approach should have been to 'scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues' (see para 93); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 referred.

(5) (per **Richard Malanjum CJ (Sabah & Sarawak)**) The remarks and findings might appear to have been directed to third parties. But the consequence of those remarks and findings fell upon the appellant. The reason was that the court of appeal rolled up the third parties with the appellant and that the appellant was assumed as the ultimate beneficiary of the actions and conduct by the third parties. In fact upon reading those remarks and findings one would be inclined to come to a conclusion that the appellant was 'punished' for the purported misdeeds by the third parties. The court was of the view that the decision and judgments of the Court of Appeal could not stand the test of real danger of bias. The consequence was that the decision and judgments of the Court of Appeal were therefore set aside (see paras 96 & 101).

(6) (per **Richard Malanjum CJ (Sabah & Sarawak)**) Whether a provision in an agreement comes within the ambit of s 75 is one of construction. And although s 75 had done away with the significant distinction between

penalty and liquidated damages under common law some of the pronouncements of the principles in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co Ltd* [1914–15] All ER Rep 739 were still relevant in considering whether a provision comes within the ambit of s 75. The burden to prove that a specified sum or stipulation is a penalty is upon the party sued for its recovery (see para 121); *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 referred.

(7) (per **Richard Malanjum CJ (Sabah & Sarawak)**) The mere use of formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s 75. It is a matter of construction premised in its 'terms and inherent circumstances, judged of as at the time of the making' of the agreement, not as at the time of the breach. In other words it 'depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.' (see para 122); *Law v Redditch Local Board* [1982] 1 QB 127 referred.

(8) (per **Richard Malanjum CJ (Sabah & Sarawak)**) Applying s 75, clause 8 was a penalty in nature in that the said clause constituted a threat held against the appellant 'in terrorem' more in the nature of a security extended to the promisee to the effect that the agreement would be performed and not a genuine pre-estimate of the damage which was likely to be suffered by the respondent in the event of such breach. However, the court was mindful to uphold the principle of sanctity of contract and the absence of any evidence indicating that at the time of entering into the contract the parties were not on equal footing. Accordingly, for the court was in agreement with the conclusion by the learned High Court judge that 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the replacement agreement any advertising rights that may have been granted under the replacement concession agreement' which the appellant 'signed within the ambit of cl 1.4 of the Signage Sub-Licence Agreement' (see paras 124–125, 127).

(9) (per **Richard Malanjum CJ (Sabah & Sarawak)**) As the subject matter of the intended trust were the 'future contracts' but that the projects or works relating to the replacement concession agreement were not within the definition of 'future contracts', it follows that there was no question of the replacement concession agreement being the subject matter of the trust upon which the respondent premised its claim against the appellant. The learned High Court judge was right in concluding that there was no basis for the claim under clause 9 of the restructure sale agreement. Further, due to the uncertainty of what projects and works should come under the purported trust there was therefore uncertainty in the subject matter of the trust (see paras 140–142).

(10) (per **Richard Malanjum CJ (Sabah & Sarawak)**) There was confusion as to what actually the respondent was claiming under the purported express trust. If indeed the replacement concession agreement was within the definition of 'future contracts' then there was merit to say that the appellant not only would

be obliged to subcontract to the respondent all the projects and works under the replacement concession agreement but it would also be holding on trust all profits and monies received by it in relation to the replacement concession agreement. That made no business sense at all. It would tantamount to the appellant spending its own capital to generate incomes only to be subject to an express trust in favour of the respondent. There was therefore merit to the assertion that it amounts to an enslavement of the appellant (see para 143).

(11) (per **Abdul Hamid Mohamad FCJ**) The question whether Fawziah Holdings should be penalized with costs of the interveners who, through no fault of theirs, had to incur expenses to intervene in the appeals. But, to order that Fawziah Holdings pay their costs, there must be some 'fault' on the part of Fawziah Holdings. It was true that Fawziah Holdings had objected to the applications of the Interveners to intervene and had argued against expunging. Their actions was understandable and quite reasonable because it was an attack on a judgment which was in their favour and that they feared of having 'a cut-up' judgment to defend. It was unfair to the Interveners that they had to bear their own costs of making these applications. It was also unfair that Fawziah Holdings had to bear their own costs of defending the judgment of the learned judge. It is even more unfair to make Fawziah Holdings bear the costs of the Interveners. All these only reemphasize the serious consequences statements from the bench could have. Therefore no order as to costs would be made and the deposits to be refunded to the interveners (see paras 174, 176–177).

[Bahasa Malaysia summary

Fawziah Holdings Sdn Bhd ('Fawziah Holdings') menyaman Metramac Corporation Sdn Bhd ('Metramac Corporation') pada asasnya untuk ganti rugi yang disebabkan oleh kemungkiran kontrak di Mahkamah Tinggi Kuala Lumpur. Fawziah Holdings (responden tersebut) menuntut terhadap Metramac Corporation ('perayu tersebut') ganti rugi dan pampasan mendakwa kemungkiran terma-terma perjanjian sub-lesen papan tanda dan perjanjian pindaan sub-lesen papan tanda kerana menamatkan perjanjian tersebut dan memberikan hak papan tanda dan pengiklanan kepada pihak ketiga. Dalam tuntutannya untuk pampasan, responden bergantung atas formula di bawah klausa 8 perjanjian sub-lesen papan tanda untuk mengirakan amaun pampasan yang kena dibayar di mana ia diperuntukkan bahawa sekiranya terdapat penamatan perjanjian konsesi yang pertama oleh perayu ataupun DBKL perayu akan membayar responden pampasan berjumlah RM7,797,000 setahun dari 1991 ke 2000 kurang diskaun sebanyak 8% dan jumlah tersebut adalah kena dibayar daripada sebarang pampasan yang diterima daripada DBKL. Responden selanjutnya memplidkan bahawa jumlah RM405 juta yang diterma oleh perayu daripada DBKL sebenarnya jumlah untuk pampasan. Dengan itu perayu telah memegangnya atas amanah untuk faedah responden. Perayu menafikan bahawa jumlah yang diterimanya adalah dipegang atas amanah dan menyatakan bahawa jumlah tersebut adalah subsidi yang dibayar oleh Kerajaan melalui DBKL untuk penyelesaian projek tersebut. Mahkamah Tinggi membenarkan sebahagian tuntutan Fawziah Holdings dan menolak yang lain. Kedua-dua Fawziah Holdings dan Metramac Corporation merayu terhadap penghakiman Mahkamah Tinggi tersebut ke Mahkamah Rayuan.

Mahkamah Rayuan membenarkan rayuan Fawziah Holdings' tetapi menolak rayuan Metramac Corporation. Metramac Corporation memohon kebenaran untuk merayu ke Mahkamah Persekutuan terhadap kedua-dua penghakiman. Penghakiman Mahkamah Rayuan, terutamanya, penghakiman Gopal Sri Ram HMR mengandungi pernyataan-pernyataan terhadap Tun Daim dan Tan Sri Halim Saad yang dibantahi mereka. Tun Daim dan Tan Sri Halim Saad bukanlah pihak-pihak ataupun saksi-saksi dalam tindakan di Mahkamah Tinggi ataupun di rayuan-rayuan ke Mahkamah Rayuan. Mereka masing-masing telah memfailkan permohonan untuk mencelah di permohonan Metramac Corporation untuk kebenaran merayu dan untuk menghapuskan/memadamkan pernyataan-pernyataan yang menjelikkan tersebut. Kebenaran merayu diperolehi dan untuk pernyataan-pernyataan yang menjelikkan dihapuskan/dipadamkan. Kebenaran merayu diperolehi yang melibatkan tiga soalan yang dikemukakan untuk keputusan mahkamah, iaitu: (a) Sama ada pembentukan satu amanah oleh sebuah syarikat merupakan satu pelaksanaan pengurangan modal yang menyalahi undang-undang; (b) Sama ada ujian yang dipakai oleh Mahkamah Rayuan, dalam menentukan sama ada klausa 8 perjanjian papan tanda adalah penetapan secara penalti dan/atau satu jumlah yang dinamakan di dalam kontrak untuk tujuan seksyen 75 Akta Kontrak 1950, adalah ujian yang betul dan/atau mencukupi? (c) Sama ada pernyataan/penemuan yang menentang di Mahkamah Rayuan dalam keadaan kes ini, apabila dipandang secara objektif, menunjukkan satu bahaya sebenar berat sebelah dipihak Mahkamah Rayuan dalam penghakiman yang dibuat terhadap perayu? Kebenaran mencelah juga diberikan kepada pencelah-pencelah.

Diputuskan, mengenepikan keputusan dan penghakiman-penghakiman Mahkamah Rayuan dan mengekalkan penemuan liabiliti perayu oleh Mahkamah Tinggi:

(1) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Peringkat di mana berat sebelah dikatakan telah berbangkit adalah tidak material. Bahaya berat sebelah yang sebenarnya boleh berbangkit pada mana-mana peringkat di satu prosiding kehakiman atau kuasi-kehakiman ataupun dalam tribunal administratif. Tahap genting dalam menentukan kehadiran berat sebelah adalah dengan secara objektif menyiasat sama ada fakta-fakta dan keadaan-keadaan yang dikatakan bukti berat sebelah dapat menjawab dengan kukuhnya ujian bahaya sebenar berat sebelah seperti yang dibentuk oleh mahkamah ini. Dalam perkataan yang lain penyiasatan adalah untuk menentukan sama ada terdapat 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate between two or more parties; he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute.' — oleh Lord *Thankerton di dalam kes Inggeris Franklin v Minister of Town & Country Planning* [1948] AC 87 (lihat perenggan 70).

(2) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Penghakiman utama mengisytiharkan bahawa 'a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.' Terdapat juga pernyataan-pernyataan keputusan yang dibuat di penghakiman

A utama yang mendakwa bahawa sikap berhati-hati telah diambil dalam menilai penemuan-penemuan mahkamah bawahan dan 'have very carefully scrutinised the disclosure documents. I have read them again and again'. Mahkamah berpendapat bahawa deklarasi sebegini bukannya mantra yang bermagik yang dapat menghalang penelitian selanjutnya. Pernyataan-pernyataan dan
B penemuan-penemuan tersebut diarahkan bukan sahaja terhadap perayu tetapi juga terhadap pihak-pihak yang bukan parti kepada tindakan tersebut. Pendek kata kesan bersih pernyataan-pernyataan dan penemuan-penemuan Mahkamah Rayuan adalah bahawa tindakan-tindakan dan kelakuan orang-orang yang disebutkan tersebut yang mana bermakna dures ekonomi
C terhadap pemegang-pemegang saham yang lepas perayu, patronaj, dan penyalahgunaan kuasa kerajaan dan kedudukan untuk faedah sendiri sesetengah orang tanpa menghiraukan wang pembayar cukai, pelesapan wang, bersempadan dengan jenayah pecah amanah dan membuat dakwaan-dakwaan liar terhadap responden (lihat perenggan 85–86).

D (3) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Surat-menyurat juga tidak menggambarkan satu situasi penyalahgunaan yang bermangsa. Pemegang-pemegang saham perayu yang lepas bukannya orang kampung. Mereka adalah personaliti korporat yang berpengalaman dan perbadanan statutori yang telah bertapak seperti Tabung Haji. Sebenarnya
E pemegang-pemegang saham yang lepas perayu bukannya parti kepada tindakan tersebut. Sudah tentu terdapat bantahan-bantahan yang bertulis sekiranya mereka ditindas. Bayaran yang dibuat selepas itu oleh kerajaan persekutuan dan DBKL diberikan dengan penjelasan. Akan tetapi cara Mahkamah Rayuan mengemukakan penghakiman utamanya adalah semacam bayaran-bayaran tersebut diberikan tanpa sebarang pertimbangan
F kebertanggungjawaban dan mengikut sesuka hati Menteri Kewangan pada masa tersebut (lihat perenggan 89).

(4) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Satu tuntutan biasa untuk kemungkiran-kemungkiran kontrak dan amanah yang nyata telah ditukarkan ke satu litigasi kepentingan awam oleh hakim-hakim yang bijaksana
G di Mahkamah Rayuan tanpa desakan daripada responden. Pengataan-pengataan dalam penghakiman utama tentang kuasa naungan, penyalahgunaan kuasa dan dures ekonomi hanya dapat datang daripada pengataan-pengataan inter alia 'pressure to sell' saham-saham tersebut, penerimaan 'instruction' daripada Tun Daim dan Metro Juara 'not foolish in
H offering' yang dibuat dihujahkan peguamcara responden di Mahkamah Rayuan dan bukan seperti yang diplidkan oleh responden. Prinsip undang-undang yang asas bahawa satu pihak diikat dengan plidingnya tidak diendahkan. Cara yang betul sepatutnya ialah 'scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues' (lihat perenggan 93);
I *R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145) dirujuk.

(5) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Pernyataan-pernyataan dan penemuan-penemuan mungkin nampak diarahkan kepada pihak ketiga. Tetapi akibat daripada pernyataan-pernyataan dan penemuan- penemuan

tersebut jatuh ke atas perayu. Ini adalah kerana Mahkamah Rayuan menyertakan pihak ketiga dengan perayu dan perayu dianggap sebagai benefisiari yang utama tindakan-tindakan dan kelakuan pihak ketiga. Sebenarnya dengan membaca pernyataan-pernyataan dan penemuan-penemuan seseorang akan lebih cenderung untuk menyimpulkan bahawa perayu telah 'dihukum' untuk kononnya salah-laku oleh pihak ketiga. Mahkamah berpendapat bahawa keputusan dan penghakiman Mahkamah Rayuan akan gagal ujian bahaya sebenar berat sebelah tersebut. Akibatnya ialah keputusan dan penghakiman-penghakiman Mahkamah Rayuan dengan ini diketepikan (lihat perenggan 96 & 101).

(6) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Sama ada sesuatu peruntukan di dalam perjanjian berada dalam lingkungan s 75 adalah satu pentafsiran. Dan walaupun s 75 tidak lagi memakai perbezaan yang penting di antara penalti dan ganti rugi tentu di bawah common law prinsip-prinsip pendapat mereka di *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co Ltd* [1914–15] All ER Rep 739 masih relevan dalam mempertimbangkan sama ada sesuatu peruntukan berada dalam lingkungan s 75. Beban pembuktian bahawa jumlah yang dinyatakan ataupun ditetapkan adalah satu penalti adalah pada pihak yang menuntut pengembaliannya (lihat perenggan 121); *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 dirujuk.

(7) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Penggunaan semata-mata formula untuk mengira jumlah yang harus dibayar tidak semestinya bermakna ia tidak akan menjadi satu 'sum named in a contract' untuk tujuan seksyen 75. Ia adalah satu perkara tafsiran berdasarkan 'terms and inherent circumstances, judged of as at the time of the making' perjanjian tersebut, dan bukannya pada masa kemungkiran. Dalam kata yang lain, ia 'depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.' (lihat perenggan 122); *Law v Redditch Local Board* [1982] 1 QB 127 dirujuk.

(8) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Dengan memakai s 75, kl 8 adalah bersifat satu penalti dimana klausa tersebut membentuk satu ugutan terhadap perayu 'in terrorem' yang lebih menyifat satu jaminan yang diberikan kepada penerima janji bahawa perjanjian akan dilaksanakan dan bukannya satu pra-anggaran sebenar ganti rugi yang berkemungkinan dialami oleh responden sekiranya terdapat kemungkiran. Akan tetapi mahkamah sedar bahawa ia harus mengekalkan prinsip kesucian kontrak dan ketiadaan apa-apa bukti yang menunjukkan pada masa kontrak dimasuki pihak-pihak tidak berada dalam kedudukan yang sama. Dengan itu, mahkamah bersetuju dengan kesimpulan hakim bijaksana Mahkamah Tinggi bahawa 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the replacement agreement any advertising rights that may have been granted under the replacement concession agreement' yang mana perayu telah 'signed within the ambit of cl 1.4 of the Signage Sub-Licence Agreement' (lihat perenggan 124–125, 127).

(9) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Oleh kerana perkara pokok amanah yang dihasratkan tersebut adalah 'future contracts' tetapi projek-projek atau kerja-kerja berhubungan dengan penggantian perjanjian konsessi bukannya dalam lingkungan definasi 'future contracts', maka tiada persoalan akan penggantian perjanjian konsessi sebagai perkara pokok amanah yang responden berdasarkan untuk tuntutannya terhadap perayu. Hakim Mahkamah Tinggi yang bijaksana adalah betul dalam memutuskan bahawa tiada asas untuk tuntutan tersebut di bawah kl 9 perjanjian beli yang disusun semula. Lanjutan, disebabkan ketidakpastian projek-projek dan kerja-kerja apa patut berada di bawah amanah yang dikatakan itu maka terdapat ketidakpastian perkara pokok amanah tersebut (lihat perenggan 140–142).

(10) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Terdapat kekeliruan apa yang sebenarnya tuntutan responden di bawah amanah yang nyata yang dikatakan itu. Sekiranya benar penggantian perjanjian konsessi adalah dalam definasi 'future contracts' maka terdapat merit untuk menyatakan perayu bukan sahaja di bawah obligasi untuk subkontrak kepada responden kesemua projek-projek dan kerja-kerja di bawah penggantian perjanjian konsessi tersebut tetapi ia juga akan memegang atas amanah kesemua keuntungan dan wang yang diterima olehnya berhubung dengan penggantian perjanjian konsessi tersebut. Ini langsung tidak dalam pertimbangan perniagaan. Ia sama seperti perayu menggunakan modalnya sendiri untuk menghasilkan pendapatan hanya dihadkan kepada satu amanah yang nyata yang memihak kepada responden. Dengan itu terdapat merit kepada penegasan bahawa ini merupakan pengabdian perayu (lihat perenggan 143).

(11) (oleh **Abdul Hamid Mohamad HMP**) Persoalan sama ada Fawziah Holdings dihukum dengan kos-kos pencelah-pencelah yang, bukan salah mereka, terpaksa menanggung perbelanjaan untuk mencelah dalam rayuan-rayuan ini. Akan tetapi, untuk mengarahkan Fawziah Holdings membayar kos-kos mereka, mesti terdapat 'fault' dipihak Fawziah Holdings. Memang benar bahawa Fawziah Holdings telah membantah permohonan-permohonan pencelah-pencelah untuk mencelah dan telah menentang penghapusan pernyataan-pernyataan tersebut. Tindakan-tindakan mereka boleh difahamkan dan adalah agak munasabah oleh kerana ia adalah serangan terhadap penghakiman yang memihak mereka dan mereka khuatir satu penghakiman 'yang dipotong' untuk dibela. Ia adalah tidak adil untuk pencelah-pencelah bahawa mereka terpaksa membayar kos-kos mereka sendiri dalam membuat permohonan-permohonan ini. Ia juga tidak adil untuk Fawziah Holdings yang kena menanggung kos mereka sendiri untuk membela penghakiman hakim mahkamah yang bijaksana tersebut. Ia lebih tidak adil untuk mengarahkan Fawziah Holdings menanggung kos pencelah-pencelah. Kesemua ini hanya menegaskan sekali lagi akibat yang serius pernyataan-pernyataan daripada anggota kehakiman. Dengan itu tiada perintah terhadap kos akan dibuat dan deposit-deposit dikembalikan kepada pencelah-pencelah (lihat perenggan 174, 176–177).]

Notes

For a case on judgment affecting right of person not party to action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3923.

For a case on written judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4148.
For cases on bias, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 109–114.
For cases on terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3727–3730.

Cases referred to

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & Another Application [2005] 3 MLJ 1 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [2002] 4 MLJ 327 (refd)
AM Mathur v Pramod Kumar Gupta & Ors [1990] 2 SCC 533 (refd)
Bahai v Rashidian & Anor [1985] 3 All ER 385 (refd)
Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293 (refd)
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)
Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co Ltd [1914–15] All ER Rep 739 (refd)
Franklin v Minister of Town & Country Planning [1948] AC 87 (refd)
Inner West London Coroner, ex parte Dallaglio [1994] 4 All ER 139 (refd)
Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)
Insas Bhd v Ayer Molek Rubber Co Bhd [1995] 2 MLJ 833 (refd)
K: a Judicial Officer AIR 2001 SC 972 (refd)
Law Kam Loy v Boltex Sdn Bhd [2005] 3 CLJ 355 (refd)
Law v Redditch Local Board [1982] 1 QB 127 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65 (refd)
MGG Pillai v Tan Chee Yionn [2002] 2 MLJ 673 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (refd)
Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353 (refd)
Phileo Promenade Sdn Bhd & Anor v Premier Modal (M) Sdn Bhd [2003] 2 MLJ 159 (refd)
PK Achuthan v State Bank of Travancore, Calicut AIR 1975 Ker 47 (refd)
PP v Datuk Harun [1977] 1 MLJ 180 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
R v Gough [1993] AC 646 (refd)
R v Valente (1985)19 CRR 354 (refd)
RDS v The Queen 151 DLR (4th) 193 (refd)
Reg v Bow Street Magistrate; Ex p Pinochet (No 2) [2000] 1 AC 119 (refd)
Robophone Facilities Ltd v Blank [1966] 1 WLR 1428 (refd)
SS Maniam v The State of Perak [1957] MLJ 75 (refd)
Scott v Scott [1913] AC 417 (refd)
State of Madhya Pradesh & Ors v Nandlal Jaiswal & Ors [1987] 1 SCR 1 (refd)
State of Uttar Pradesh v Mohd Naim [1964] AIR SC 703 (refd)
State of West Bengal v Babu Chakraborty AIR [2004] SC 2324 (refd)

A *Sundram v Arujunan & Anor* [1994] 3 MLJ 361 (refd)
T v Secretary of State for the Home Department [1995] 1 WLR 545 (refd)
Tay Choo Wah v PP [1976] 2 MLJ 95 (refd)
V Sujatha v State of Kerala & Ors [1994] Supp (3) SCC 436 (refd)
Valente v Her Majesty the Queen [1985] 2 SCR 673 (refd)

B **Legislation referred to**
Companies Act 1965 ss 64, 365(1)
Contracts Act 1950 ss 30, 75
Penal Code s 405

C **Appeal from**: Civil Appeal Nos W–02–1009 of 2003 and W–02–1013 of 2003 (Court of Appeal, Putrajaya)

Muhammad Shafee Abdullah (S Sivaneindiren, Teh Eng Lay and Kaushalya Rajathurai with him) (Cheah Teh & Su) for the appellant.
D
Cyrus Das (Benjamin Dawson, Steven Thiru, Alvin Tang, Koh San Tee, David Mathew and Nor Aisyah Abu Bakar with him) (Noraisyah & Co) for the respondent.
Cecil Abraham (Sunil Abraham with him) (Shearn Delamore & Co) for the intervener Tun Daim Zainuddin.
E *Tommy Thomas (Alan Gomez and Jason Wee with him) (Tommy Thomas) for the intervener Tan Sri Halim Saad.*

Richard Malanjum CJ (Sabah & Sarawak):

INTRODUCTION

F

[1] There are two matters before this court for our consideration. The first is an appeal by the appellant against the decision of the Court of Appeal delivered on 25 October 2005. The second is the respective applications by two Interveners to have certain findings and comments found in the two judgments of the Court of
G Appeal expunged on the grounds as contained in their respective affidavits.

[2] In respect of the appeal we have given leave to appeal on 27 March 2006 involving three questions posed for our determination, namely:

H (a) whether the creation of a trust by a company amounts to an illegal reduction of its capital?

(b) whether the test adopted by the Court of Appeal, in determining whether cl 8 of the signage agreement is a stipulation by way of a penalty and/or a sum named in the contract for purposes of s 75 of the Contracts Act 1950, is the
I correct test and/or is exhaustive?

(c) whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court of Appeal in the judgment arrived at against the appellant?

Leave to intervene was also granted to the interveners on 7 March 2006.

[3] This judgment will deal only with the first matter, that is, the appeal proper. A separate judgment will be delivered in respect of the second matter.

[4] At the outset of the hearing of the appeal proper learned counsel for the appellant intimated to us that he would proceed to deal first with the third question posed and to be followed by the first and second questions. Accordingly in this judgment we will adopt the same sequence. But to better understand the real issues involved in the questions posed it is imperative that we should first state the background facts and basis of the decisions of the courts below.

BACKGROUND FACTS

[5] The appellant was formerly known as Syarikat Teratai K.G. Sdn Bhd ('STKG'). It only changed its name to Metramac Corp Sdn Bhd ('Metramac') on 4 March 1991 after it was bought over by Metro Juara Sdn. Bhd. ('Metro Juara').

[6] STKG and Fawziah Holdings Sdn Bhd (the respondent in this appeal) at the material time shared common shareholders and directors, namely, Dato' Fawziah and her mother Maimoon Bee.

[7] In July 1986 Dato' Fawziah, through her company STKG, bid in an open tender called by Dewan Bandaraya Kuala Lumpur ('DBKL') to design, construct, finance and operate in the privatization of certain roads in the Kuala Lumpur area ('the concession area') and to collect the tolls for a period of 12 years. There were five other bidders including United Engineers Malaysia Berhad ('UEM'). STKG was at that time engaged in several other projects especially in the building of low cost flats in Kuala Lumpur and Seremban and other civil engineering works.

[8] STKG won the tender and signed the first concession agreement dated 20 November 1987 with DBKL ('the first concession agreement'). A material clause in the first concession agreement was the 'land rights' clause, out of which arose the licensing agreement for signage rights in favour of STKG. The signage rights refer to the advertising rights through signboards and billboards etc along the concession roads to be built by STKG in the concession area.

[9] The first concession agreement was in the nature of a build, operate and transfer agreement wherein upon the expiry of the concession period, the roads would revert back to DBKL.

[10] It was also anticipated by DBKL that any company operating the first concession agreement area would be required to raise funds from potential investors for the project.

[11] In order to assure investors that all funds invested would go into the project a separate company focused to do the project would be desirable. After being advised by its professional financial consultants, Schroder, STKG was restructured to hive off all its non-concession businesses so that it became a one project company.

[12] Hence, on 31 March 1988, STKG and the respondent entered into a sale agreement dated 31 March 1988 ('the restructure sale agreement') wherein STKG disposed of all its current business activities, assets and liabilities to the respondent save for the new business activity pursuant to the first concession agreement. As stipulated in the restructure sale agreement, this was done in view of the intended changes in the business to be carried out by STKG including its new business venture to be undertaken.

[13] Some of the pertinent terms in the restructure sale agreement were thus:

(i) that several of STKG's assets, rights and liabilities were sold to the respondent;

(ii) that STKG agreed to grant some benefits to the respondent which includes advertising rights under the first concession agreement throughout the concession period;

(iii) that it was also agreed that all contracts and future contracts obtained by STKG were to be subcontracted to the respondent and if they were not so subcontracted, any monies, profits and benefits from such contracts or future contracts were to be held by the STKG on trust for the benefit of the respondent. By cll 9.4 and 9.5 STKG agreed to hold on trust for the respondent any 'future contracts' entered into by it.

[14] It is important to note that at the time of entering into the restructure sale agreement, Dato' Fawziah and her mother were the only shareholders/directors of STKG. Nevertheless due disclosures were made and approvals were obtained from the shareholders in relation to the restructure sale agreement.

[15] The restructure sale agreement was amended by a supplemental sale agreement dated 12 September 1988 ('the supplemental sale agreement').

[16] After the execution of the restructure sale agreement and the supplemental sale agreement thereto, in December 1988 four institutions and an individual invested in STKG with funds injected in the total sum of RM65m. The new shareholders were the American International Assurance Ltd, Bank Pembangunan Malaysia, Tabung Haji Malaysia, Mitsui Construction and one Madam Itjih Nursalim from Indonesia. STKG thus ceased to be a family company.

[17] A formal shareholders agreement ('the shareholders agreement') was signed on 29 December 1988 between Dato' Fawziah, Puan Maimoon and the new shareholders. Its contents inter alia, were the acknowledgment by the new shareholders of the hiving off, that is, the sale of the non-concession business' assets and liabilities of STKG to the respondent. Dato Fawziah was appointed as the Managing Director of STKG because of her experience in securing the first concession agreement which remained the only business activity of STKG.

[18] Under the Shareholders Agreement Dato' Fawziah and her mother collectively held the largest interests in STKG (20.34%). Further, Dato' Fawziah had control over

the manner in which voting rights were exercised by Mitsui Construction Company Ltd, which held an 18.45% interest in STKG. A

[19] Meanwhile, facilities were obtained by STKG from a consortium of bankers and a Facilities Agreement was entered into on 26 January 1989. The sum obtained was RM204,000,000. B

[20] In furtherance to the first concession agreement, a License Agreement was entered into between DBKL and STKG on 31 January 1989 (the license agreement) in which STKG was given exclusive license to erect any advertisement or signage on licensed premises within the concession area (the advertisement rights). C

[21] On or around 1 September 1990, upon completing the road works on the Cheras section of the concession area, STKG began collecting tolls at its tolling station. The rate was RM1 for light vehicles and RM2 for heavy vehicles. D

[22] An unexpected event happened after STKG commenced to collect tolls. Public demonstrations took place leading the Federal Government to step in to deal with the situation. As a result thereof, DBKL by its letter dated 12 September 1990 instructed STKG to suspend the collection of tolls at the Cheras tollbooth. STKG complied with the instruction although it took the stand that it was not legally obliged to do so. E

[23] Dato' Fawziah was thus asked by the Board of Directors of STKG to discuss with DBKL and the Federal Government on the various options available due to the critical financial predicament faced by STKG, namely, at risk were that the RM40m loan repayment yearly to its lenders would not be serviced without the toll collections and the RM65 millions investment paid in by the new shareholders of STKG. Various options, including compensation for termination, were proposed to DBKL. F

[24] After the suspension of the toll collection and by 2 October 1990 it became obvious to the new shareholders of STKG that the first concession agreement in its original form could no longer be performed and had to be terminated. STKG authorized Dato' Fawziah being the Managing Director to negotiate for compensation in the event of termination. G

[25] DBKL agreed in principle to the option that the first concession agreement should be terminated and that compensation would be paid. However no definite sum was mentioned. H

[26] Meanwhile, Dato' Fawziah and the other shareholders received from UEM an offer to purchase all their shares in STKG. I

[27] By 24 November 1990, UEM through its solicitors proceeded to make an offer to the shareholders of STKG for the acquisition of all their shares in STKG on payment of the sum of RM97,543,459.50.

A **[28]** A draft sale and purchase agreement was thus forwarded by UEM's solicitors to the shareholders of STKG for their consideration together with a covering letter dated 11 December 1990.

B **[29]** During the Directors' Meeting of STKG held on 13 December 1990, the directors noted that the majority of the shareholders had signed the sale and purchase agreement to sell their shares in STKG to UEM. In fact there was also a shareholders' meeting held on the same day. Common to the two meetings was a briefing note which recommended for a quick sale of the shares in STKG. The shareholders approved and accepted the recommendation.

C

[30] Meanwhile on 2 November 1990 Dato' Fawziah secured the execution of a Signage Sub-Licence Agreement (the Signage Sub-Licence Agreement) between STKG and the respondent which agreement contained, inter alia, the granting to the respondent by STKG an exclusive sub-licence to erect signage on the licensed D premises (that is the exercise of the advertisement rights) during the concession period and in consideration thereof the respondent would pay RM1,000 per year to STKG.

E **[31]** Dato Fawziah further managed to have the Signage Sub-Licence Amending Agreement executed on 15 December 1990 between STKG and the respondent which agreement addressed on the happenings of two events, namely:

(i) for the mutual termination of the first concession agreement dated 20 November 1987; and

F (ii) the termination of the Signage Sub-Licence Agreement by STKG.

[32] On 23 January 1991 an agreement was executed on the sales of all STKG shares to Metro Juara Bhd ('Metro Juara') a nominee of UEM but with Anuar Othman and Dato Halim Saad registered as the owners. Metro Juara paid a premium G of approximately RM32.5m for the shares (RM0.50 per share) bringing the total consideration to approximately RM97.5m.

[33] On 8 February 1991 a resolution was passed by the outgoing Board of Directors of STKG wherein they resigned and new directors were appointed. H They also authorized the transfer of shares to Metro Juara. In addition the outgoing Board of Directors of STKG proceeded to ratify the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement. The new incoming Board of Directors was not informed of the ratification.

I **[34]** STKG's name was then changed to Metramac Corporation Sdn Bhd ('Metramac') now the appellant, subsequent to Metro Juara acquiring it.

[35] The whole transaction was undertaken on an 'as is where is' basis, with a preliminary audit undertaken by the accounting firm of Messrs Shamsir Jasani & Co.

[36] By a letter dated 29 June 1992 through its solicitors Messrs Rashid & Lee the appellant proceeded to rescind the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement on the grounds that the then Board of Directors of the appellant (then called STKG) failed to discharge their fiduciary duties to the appellant. It was alleged that those agreements were not entered in the best interest of and not beneficial to the appellant. It was also alleged that even if those agreements were ratified they would remain null and void for want of valid disclosure as to the nature, effect and basis of the Signage Sub-Licence Agreement by the then Board of Directors.

[37] Initially the respondent disputed and refused to accept the rescission of the two agreements by the appellant vide its solicitors' letter dated 6 July 1992. However, by its solicitors' letter dated 26 May 1993 the respondent considered the act of rescission by the appellant as an act of repudiation of the two agreements and accepted the same.

[38] Meanwhile, the first concession agreement was formally terminated and replaced with a new concession agreement known as the Replacement Concession Agreement dated 13 February 1992 signed between DBKL and the appellant (Replacement Concession Agreement) in which it was a term that the rights to compensation under the first concession agreement would cease. However DBKL subsequently paid the appellant the sum of RM405m.

[39] In its suit against the appellant the respondent claimed damages and compensation from the appellant alleging breach of the terms of the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement for terminating them and by giving the signage and advertising rights to third parties.

[40] In its claim for compensation the respondent relied on the formula under cl 8 of the Signage Sub-Licence Agreement to calculate the amount of compensation payable. In that clause it was stipulated that in the event of termination of the first concession agreement by either the appellant or DBKL the appellant would have to pay the respondent a compensation in the sum of RM7,797,000 per annum from 1991 to 2000 less 8% discount per annum and the same would be payable from any compensation received from DBKL. The Signage Sub-Licence Amending Agreement which covered the Signage Sub-Licence Agreement also stipulated that the compensation sum would be payable by STKG to the respondent notwithstanding that no compensation could be recovered from DBKL.

[41] It was also the case of the respondent that pursuant to cl 4.6 of the first concession agreement the licence for land rights granted by DBKL to STKG included the advertising rights as provided for in cl 4.4 thereof.

[42] The respondent further pleaded that the sum of RM405m received by the appellant from DBKL was in fact compensation sum. Hence the appellant was holding it on trust and for the benefit of the respondent.

[43] The appellant denied that the sum received was held under trust and countered that the said sum was a subsidy paid by the Government through DBKL for the completion of the project.

[44] Specifically the respondent sought for the following orders to be made against the appellant, namely:

(a) damages for the breach of the restructure sale agreement in respect of advertising rights;

(b) further or alternatively, damages in the sum of RM65,182,920 for breach of the Signage Sub-Licence Agreement;

(c) an account with inquiries and consequential direction of all profits, monies and benefits received and to be received by the appellant under the Replacement Concession Agreement and the 'said contracts';

(d) a declaration that the appellant holds the said profits, monies and benefits received and to be received on trust for the benefit of the respondent;

(e) a declaration that the appellant has misappropriated the sum of RM190 and an order for the restitution thereof to the respondent;

(f) an order that the appellant do pay and/or transfer to the respondent all of the said profits, monies and benefits received and to be received under the Future Contracts;

(g) general damages;

(h) interests; and

(i) costs.

[45] In response to the claim made the appellant denied liability and counterclaimed against the respondent contending, inter alia:

(a) That the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement were entered into between the appellant and the respondent through the previous directors, namely, Dato' Fawziah and Maimoon Bee in breach of their fiduciary duties to the appellant;

(b) That Dato' Fawziah and Maimoon Bee while as directors of the appellant caused the appellant to enter into the Signage Sub-Licence Amending Agreement when they knew that no compensation would be payable by DBKL to the appellant and thus in breach of fiduciary duties as directors thereby resulting in the said Signage Sub-Licence Amending Agreement being void;

(c) That Dato' Fawziah and Maimoon Bee while as directors of the appellant made secret profit arising from the execution of the Signage Sub-Licence Agreement as they were also the only directors and shareholders of the appellant at that time and they knew that in the event of the first concession agreement being terminated compensation would be paid by the appellant to the respondent. Further, Dato' Fawziah and Maimoon Bee took advantage of the situation by

executing the Signage Sub-Licence Amending Agreement when it was already agreed by the then shareholders of the appellant to terminate the first concession agreement; and

(d) That the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement were null, void and of no effect.

BEFORE THE HIGH COURT

[46] The trial commenced in early March 1998 before Steve Shim J (as he then was) who heard the evidence up to the end of the first witness for the defence. Subsequently the conduct of the trial until delivery of judgment was taken over by Kang Kwee Gee J who:

(a) held the appellant liable for breach of contract for the loss of advertising rights under the Signage Sub-License Agreement;

(b) dismissed the claim of the respondent for the sum of RM65,182,920 holding that it was subject to s 75 of the Contracts Act 1950 and thus a penalty. Damages was therefore ordered to be assessed;

(c) dismissed the claim of the respondent for loss of profits, monies or other benefits arising from the future contracts holding that such future contracts were void for uncertainty under s 30 of the Contracts Act 1950 The learned judge also held that there was no consideration provided by the respondent for such future contracts;

(d) dismissed the claim by the respondent for liquidated damages; and

(e) dismissed the counterclaim of the appellant.

[47] Dissatisfied with the decision of the High Court the respondent appealed to the Court of Appeal on several grounds. The appellant also appealed against certain orders made by the learned High Court judge.

BEFORE THE COURT OF APPEAL

[48] There were two appeals before the Court of Appeal one by the respondent (Civil Appeal No W–02–1009 of 2003) and the other by the appellant (Civil Appeal No W–02–1013 of 2003).

[49] After hearing the two appeals the Court of Appeal made the following orders:

(a) dismissed the appeal by the appellant with costs against the finding on liability in respect of the claim by the respondent for the loss of advertising rights;

(b) dismissed the appeal by the appellant with costs on the dismissal of its counterclaim by the High Court; and

(c) allowed with costs the appeal by the respondent thereby giving judgment for the respondent on the claim for the sum of RM65m and for the loss of profits derived from future contracts to be determined by the registrar.

[50] Although the decision of the Court of Appeal was unanimous the main judgment was rendered by YA Gopal Sri Ram JCA with YA Hashim Yusof JCA concurring (the main judgment) whilst YA Zulkifli Makinuddin JCA gave a supplementary judgment (supplementary judgment). Both the judgments of the Court of Appeal for the purpose of this judgment are collectively referred to as 'the judgments'.

BEFORE THIS COURT

[51] The 3rd question reads:

> Whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court of Appeal in the judgment arrived at against the Appellant?

[52] It was submitted that in both the judgments of the Court of Appeal there are remarks and findings made by the learned judges that could be construed as adverse, disparaging and unwarranted. Emphasis was made that those remarks are integral parts particularly to that of the main judgment. Hence they exhibited a real danger of bias on the part of the Court of Appeal against the appellant. The real danger of bias manifested itself from the Court of Appeal's own written judgments.

[53] Learned counsel for the appellant listed down the remarks and findings in the form of Appendix B to his written submissions. For convenience we reproduce them herein.

[54] From the main judgment the remarks and findings identified are thus:

Paragraph 10:

> a.... There then took place a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.

Paragraph 11:

> b.... An appeal to the then Minister of Finance, Tun Daim Zainuddin, fell on deaf ears. He simply told the Defendant's then existing shareholders that the Federal Government was not is a position to pay the defendant any compensation.

Paragraph 12:

> c. The next thing that happened was this. By letters dated 12 November 1990 and 24 November 1990 a company called UEM Bhd, a public limited company made an offer to purchase all the shares in the Defendant company for a sum of RM97.5 million. Curiously enough, neither letter made any mention of the proposed termination of the concession agreement by DBKL. In reality the shares were to be purchased by a company nominated by UEM. That company was Metro Juara Sdn. Bhd. which had merely two shareholders who were also its sole directors. These gentlemen were one Anuar Othman and one Dato Halim Saad. The defendant's shareholders could not resist the sale. Their predicament is reflected in a document called the Directors Briefing Note dated 13 December 1990. And it is not difficult to appreciate their dilemma. The whole idea of obtaining the tender was Dato' Fawziah's brainchild. The other shareholders had invested

large sums of money. The defendant had done all that was required of it under the first concession agreement. It had spent large sums of money to carry out its obligations. It now found itself with the ground cut from under its feet because of DBKL's termination of the first concession agreement. No compensation had been paid to the defendant as matters then stood although compensation was clearly payable. No one in his or her right mind will consider the choice of selling of their shares to Metro Juara at RM97.5m as a choice at all. All the independent evidence on record points to this being in reality a crude case of economic duress presenting itself in a more subtle form.

Paragraph 13:

d. Now, the offer by UEM to buy out the defendant's shares for RM97.5m simply does not make any commercial sense. Here you have a company that has just had its loan and shareholders capital wiped out in one stroke. It had no money in its coffers. It had huge debts. It had no prospects of receiving any compensation from DBKL. So why pay RM97.5m for the shares of such a company? The answer is simple enough. Anuar Othman and Dato' Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin....

Paragraph 14:

e. The next event that happened was the mechanics of the takeover of the defendant by Metro Juara. It was a rushed transaction. There was no examination of the defendant's books. No warranties were asked for or given. No due diligence exercise was ever carried out. An agreement called the Share Sale Agreement dated 23 January 1991 was executed. Thereafter, the defendant's name was changed to Metramac Corporation Sdn Bhd, the name by which the defendant is now cited in the instant proceedings.

Paragraph 15:

f. Not long after the take over, a strange thing happened. Where doors were once closed to the defendant before its take over, as if by the utterance of a magic spell all bureaucratic doors were opened to the defendant after its takeover by Metro Juara. And, as if by the rub of a magic lamp, the Federal Government and DBKL who hitherto claimed to be impoverished suddenly found themselves flush with funds. They were now in a financial position to compensate the defendant. The figures are staggering. In one way or another, the defendant was to receive a total sum of RM756.7m. Let me give some details.

Paragraph 16:

g. In its letter of 30 August 1991, DBKL said that it would pay the defendant RM312 million for the costs of works done. On 13 February 1992, the Federal Government in conjunction with DBKL agreed to subsidize the defendant with a sum of RM405m to enable the defendant to meet the cost of financing the works to be undertaken under a concession agreement that was to be entered into between DBKL and the defendant. Mark you, at this point in time, not a stick of work had been done under the new concession agreement. On that very day, that is to say, 13 February 1992, two other events occurred. First, DBKL entered into another concession agreement with the defendant. I will refer to this as the second concession agreement. Second, the Ministry for Public Works gave the defendant an undertaking to pay it RM32.5m as 'payment for share premium' not 'previously taken into account': So far as this case is concerned, the words within quotation marks are meaningless. Because they have no nexus whatsoever to any of the agreements entered into between the several parties. You may well ask how all this could have happened without the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover

shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals — to profit them — instead of a wider Section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

Paragraph 17:

h. For the sake of completeness, it must be mentioned that the RM32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato' Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was stupefying. He said that these two gentlemen had, as shareholders paid this sum into the defendant's account and were now reimbursing themselves.

Paragraph 34:

i. The second thing that is wrong with the defendant's argument is this. Assume for a moment that the defendant's present shareholders are mounting this challenge in the name of the defendant. Assume that they are entitled to do so - which is not the law. Even so, they must come to court with clean hands. But they do not. They are the ones who misappropriated the defendant's property - the RM32.5 million. They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[55] And from the supplementary judgment the remarks and findings identified are thus:

Paragraph 34:

a. It would appear it did not make business sense for Metro Juara to offer to pay RM97.5m for a company that had lost its only business. But it was explained by the fact that there was the commitment in principle by DBKL to compensate STKG for a sum which was estimated at RM764m. As events went an amount equivalent to this sum was indeed paid by DBKL to STKG (now called Metramac, after its takeover by the UEM-nominated Metro Juara) between August 1991 and February 1992;

Paragraph 35:

b. It became apparent, albeit later, that the Government had decided by then that UEM should take over the project by buying over STKG. The existing shareholders were all then under pressure to sell off their respective shares to UEM. The existing shareholders of STKG were also told by the then Finance Minister Tun Daim that the Government was not in the position to pay compensation to them. This is evidenced from the exchange of letters between Dato' Fawziah and Tun Daim....;

Paragraph 42:

c. In total, the payment to Metramac, by one description or the other, now totalled RM756,700,000. It is not payment under the second concession agreement. It must include the 'termination charges' of RM63m to the plaintiff put forward by Metramac itself;

Paragraph 43:

d. It is not mere coincidence that the sum of RM756,700,000 paid, or to be paid, to Metramac approximates the sum of RM764,000,000 claimed as compensation by STKG for termination of the first concession agreement;

Paragraph 44:

e. It is also not mere coincidence that Metramac had to mutually agree to the termination of the first concession agreement and receive in return a payment or pledge of payment totalling RM756,000,000;

Paragraph 45:

f. In short, STKG which was bought by Metro Juara for a mere RM97.5m was within a year paid or pledged to be paid to Metramac a sum of RM756.7m even before undertaking the works under the second concession agreement;

Paragraph 46:

g. In the wake of these changes, the new owners of STKG, as Metramac, have purported to rescind the signage agreement and the amendment agreement. Later they have also repudiated the restructure sale agreement of 31 March 1988.

[56] Briefly put it was the contention of learned counsel for the appellant that when viewed objectively, the Court of Appeal's written judgment portrayed Dato' Fawziah as the innocent victim of economic duress and the appellant's purported 'present shareholders' along with Tun Daim Zainuddin as the oppressors. When viewed objectively and having regard to the circumstances of the case, the appellant and its case have been unfairly regarded with disfavour.

[57] In response to the submissions made by learned counsel for the appellant on the third question posed the submissions by learned counsel for the respondent may be summarized thus:

(a) firstly, there is a presumption of impartiality;

(b) secondly, the adverse findings made against the appellant were on issues of law and supported by the evidence; and

(c) thirdly, the adverse and disparaging remarks and findings against third parties did not affect the determination of the legal issues.

THE ALLEGATION OF BIAS — ANY MERIT?

[58] We will approach this issue by considering globally the opposing contentions of the parties.

[59] Learned counsel for the respondent emphasized on the presumption of impartiality. He submitted that a litigant alleging bias against a judge has first to overcome the presumption of impartiality. The burden rests with the party making the allegation. Basically learned counsel argued that bias on the part of judges should not be easily assumed since judges have been sworn to administer impartial justice.

Indeed he submitted that 'the effect of the presumption boils down to this: that persuasive evidence that is cogent and convincing will be required if the presumption of impartiality of a judicial officer is to be rebutted'.

[60] To support his submission learned counsel made references to the views expressed in the Canadian Supreme Court case of *RDS v The Queen* 151 DLR (4th) 193 where Cory J said (paras 113 and 117):

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.
>
> ...
>
> Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.... The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

[61] From the submission of learned counsel for the respondent it is obviously admitted that the presumption of impartiality 'does not provide blanket immunity to judges in the sense that judicial acts can never be challenged on grounds of bias.' But to rebut it requires 'cogent evidence' and to be firmly established that there is a reasonable apprehension of bias.

[62] Incidentally, it is interesting to note some of the illuminating and advisory comments made in the Canadian case. Paragraphs 118, 120 and 129 for instance state this:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct....
>
> Regardless of their background, gender, ethnic origin or race, *all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations.*
>
> However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such

as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence (Emphasis added.)

[63] Learned counsel for the appellant submitted that 'the branding of the appellant as the 'subjective litigant' in the course of his oral submission is wholly irrelevant... it merely appears to avoid answering the issues here: are the remarks and findings not made in such an outspoken and extreme and unbalanced terms? are not the remarks and findings unnecessary and irrelevant to the circumstances of the case? are not the remarks and findings unsupported by evidence? These questions can be answered objectively by this honourable court personifying the reasonable man.'

[64] The respondent on the other hand further narrowed down the issue by contending that 'the adverse findings made by the concurring judges of the Court of Appeal relate to what is described as 'a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs'... the adverse remarks against the third parties which are said to constitute bias on the part of the Court of Appeal are set out as Ground 1 of the Memorandum of Appeal. It is important to note the place of these remarks in the 1st judgment (main judgment) and that these remarks were in the nature of observations of the background facts relating to the various issues arising in the appeal.'

[65] Having considered the lengthy submissions from both sides in respect of the third question posed we are of the view that the real issue is whether, premised on the remarks and findings made by the Court of Appeal in the judgments as identified by the appellant in this appeal, the element of real danger of bias has been established hence rebutting the presumption of impartiality. In other words, the test as approved by this court in cases such as *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1 and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 applies. Briefly the test involved a question to be asked, namely: 'whether, when viewed objectively, having regard to the circumstances of the case, there was a real danger of bias on the part of the relevant member of the tribunal in question, even though unintentionally, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration?'

[66] It should also be noted that the grievance of the appellant arises from the contents of the judgments of the Court of Appeal. Some of those remarks and findings are related to third parties who are not parties to the litigation between the appellant and the respondent.

[67] From the respective submissions of learned counsel for the parties it is acknowledged, albeit indirectly, that the approach taken by the appellant, namely, to premise the allegation of bias on the judgments of the Court of Appeal is quite unprecedented. The task is made more difficult as there appears to be hardly any judicial decision on this specific point made by our courts or by the courts in other common law jurisdictions.

[68] We also bear in mind the submission of learned counsel for the respondent that those remarks and findings complained of did not affect the correctness of the decision of the Court of Appeal.

[69] Now, in our view it does not mean that real danger of bias can never be found arising from a judgment delivered by a court of law. The Canadian case of *R.D.S v The Queen* (supra) acknowledges that it can arise when delivering judgment. Moreover it has been said that 'in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.' (per Lord Nolan in*Reg v Bow Street Magistrate; ex p Pinochet (No 2) (HL(E))* [2000] 1 AC 119 at p 139).

[70] We are therefore of the opinion that the stage at which bias is said to have arisen is quite immaterial. The real danger of bias can arise at any stage in a judicial or quasi-judicial proceeding or even in administrative tribunal. The crucial point in determining the presence of bias is to objectively enquire whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test for real danger of bias as formulated by this court. In other words the enquiry is to determine whether there is 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate between two or more parties; he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute.' (per Lord Thankerton in the English case of *Franklin v Minister of Town & Country Planning* [1948] AC 87).

[71] Further, we do not think there is any good reason to limit any finding of real danger of bias in a judicial proceeding only up to the stage of pre-delivery of judgment. The element of real danger of bias can be said to have played a role in a tribunal or in any of its members at the time of coming to its decision if the judgment delivered or the contents therein render an affirmative answer after taking it through the test of bias as enunciated by this court, objectively and carefully, by the reviewing or appellate court personifying as a reasonable man or a fair-minded and informed observer (see *R v Gough* [1993] AC 646).

[72] In other words the question is 'whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' (see *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2002] 4 MLJ 327; *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65). In fact in the case of *Locabail (UK) Limited v Bayfield Properties Limited* this is what the English Court of Appeal said at pp 77–78:

> ... a real danger of bias might well be thought to arise if... in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly*...); or if,

for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issue before him....

[73] But we hasten to add that any allegation of real danger of bias based on a judgment delivered should not be readily entertained by an appellate court. The reason is simple. A losing party would only be too willing to allege bias. This might be what was referred to during the submission before us as 'opening the floodgates' if the present appeal were to be entertained readily. Thus, we would therefore think that unless there exists in reality remarks and statements in the judgment delivered indicating on the face of the record a real danger of bias such allegation should be rejected summarily. In this way it will 'avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias' (see *Majlis Perbandaran Pulau Pinang v Sykt Berkerjasama Serbaguna Sungai Gelugo*r. Indeed this is how Lord Hope of Craighead explained the rationale in *Reg v Bow Street Magistrate; ex p Pinochet (No 2)* (HL(E))at p 142:

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] AC 646 is whether there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias.

[74] Having said the foregoing we now turn to the judgments of the Court of Appeal with particular reference to the submission that the remarks and findings complained of are evidence of apparent bias thereby rebutting the presumption of impartiality.

[75] Impartiality of course refers 'to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial'... connotes absence of bias, actual or perceived.' (per LeDain J in *Valente v Her Majesty the Queen* [1985] 2 SCR 673 at p 685). It has also been said that 'the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.' (See: Commentaries on Judicial Conduct (1991) published by the Canadian Judicial Council).

[76] But before embarking to apply the bias test on the impugned remarks and findings we think it is pertinent to first consider whether those remarks and findings were essential and relevant in determining the matter before the Court of Appeal.

[77] We note that the claims by the respondent are for damages and compensation against the appellant for breach of contract, to wit, breach of the terms of the Signage

Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement for terminating them and by giving the signage and advertising rights to third parties.

[78] Another claim is for declaration of trust in respect of the sum of an account to all monies, profits and benefits gained and to be gained by the appellant under the Replacement Concession Agreement and future contracts.

[79] Having carefully examined the relevance and the context in which the remarks and findings were made particularly in the main judgment of the Court of Appeal we are of the view that they were unnecessary and irrelevant in determining the issues and claims before the court. It is indeed regrettable that those remarks made were not only unnecessary but that the language used was unwarranted to say the least. However, those remarks alone cannot ipso facto be the basis to set aside the decision of the Court of Appeal (see *State of West Bengal v Babu Chakraborty* AIR [2004] SC 2324). More will be said on this point when determining the second matter before us.

[80] Meanwhile, judges, magistrates and those entrusted to perform judicial or quasi-judicial functions are well advised to bear in mind at all times what was said by this Court in *Insas Bhd v Ayer Molek Rubber Co Bhd* [1995] 2 MLJ 833 at p 841:

> The objectionable and wholly offensive remarks made against a court of law, the plaintiffs and their solicitors, and the learned High Court judge, all of whom had had no opportunity to defend themselves in the face of such unwarranted and unjustified criticisms, ought to be expunged from the judgment of the Court of Appeal, as it has a tendency to bring the whole administration of law and order in the courts into disrepute. It is judicially recognized that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

[81] We are aware that judges are entitled to express their opinion and observations including criticism in a given case (see *K: a Judicial Officer* AIR [2001] SC 972). There are a host of cases on the point. In *Bahai v Rashidian & Anor* [1985] 3 All ER 385 the English Court of Appeal observed thus:

> The fact that a judge has determined the issues in the action and in so doing has expressed views on the conduct of the parties and of the witnesses, neither constitutes bias nor the appearance of bias in relation to subsequent applications in the action. (per Sir John Donaldson MR at p 388).

In the same case Balcombe LJ at p 391 said:

> A judge properly exercising his judicial function, eg by criticising the conduct of a party's solicitor in the course of his judgment on a matter which he considers relevant to his decision, cannot by that process be said to be biased. Bias is the antithesis of the proper exercise of a judicial function.

Similar opinion was expressed by Bingham MR in *Inner West London Coroner; ex parte Dallaglio* [1994] 4 All ER 139 when he said this:

> ... it not infrequently happens that judges find themselves called upon to criticise, sometimes in strong terms, parties or witnesses appearing before them. The subjects of such criticisms are apt to complain that the judge was prejudiced or biased against them. But such complaints will carry no weight with an appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material, inappropriate. In such a case there is no element of extraneous prejudice or predilection and hence, in the eyes of the law, no question of bias.

[82] But as those cases show such criticisms or remarks are not without limit. They 'will carry no weight for the appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material, inappropriate.' Hence, in our view what is expected from an adjudicating tribunal is to consider only the evidence adduced to determine if the claims have any merits. In the present appeal the claims are not in the nature of public interest litigation or having an element of public law so as to warrant remarks and findings as found in main judgment of the Court of Appeal. We do not think the Court of Appeal was called upon to adjudicate a dispute which required it to champion the cause of taxpayers or to deride the reputations or even to rebuke those not parties to the action for their alleged abuse of powers.

[83] There is of course the issue of judicial independence. However, a judge must accept that the freedom attached to his adjudicative independence imposes concurrent responsibility to address only those issues properly before him, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before him. Independence means that in the discharge of his function a judge is subject to nothing but the law and the command of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures. The goal of judicial independence is to ensure justice is done in individual cases and to ensure public confidence in the justice system. Le Dain J in *R v Valente* [1985] 19 CRR 354 at p 364 said:

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test of independence should include that perception.

[84] We now turn to the allegation and assertion of real danger of bias arising from those impugned remarks and findings. It is trite law that any decision tainted with real danger of bias as found would invariably be set aside (see *RDS v The Queen*; *Reg v Bow Street Magistrate; ex p Pinochet (No 2)*(HL(E.))).

[85] The main judgment declares that 'a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.' There are also the concluding statements made in the main judgment noting that greater care was taken in examining the findings of the lower court and

'have very carefully scrutinised the disclosure documents. I have read them again and again'. In our view these declarations are not magical mantras that would preclude further scrutiny. Thus, it falls upon us to determine if there is such evidence which justifies those remarks and findings.

[86] It is not in dispute that those remarks and findings were directed not only against the appellant but also against certain personalities who were not parties to the suit. In short the nett effect of the remarks and findings by the Court of Appeal is that the actions or behaviour of those persons mentioned amounted to economic duress against the former shareholders of the appellant, patronage and abuse of governmental powers and positions for personal gains of some persons in complete disregard to taxpayers' money, misappropriation of funds bordering on criminal breach of trust and the making of wild allegations against the respondent.

[87] In the main judgment the learned judges painted this scenario. That Dato' Fawziah and her mother had an excellent idea which was then translated into the core business of the appellant. After substantial investment obtained from the other previous shareholders success of the business was in sight when suddenly the suspension of the toll collection came about which spelled economic disaster to those previous shareholders. No one came to assist, not even the Federal Government or DBKL, despite requests for assistance. It was when the previous shareholders were in dire strait that the present shareholders appeared offering them a sum of money that they had no choice but to accept in order to avoid total financial disaster. That the present shareholders could make such move due to what they could subsequently manage to obtain not only from the Government but also from DBKL. The reason they could do it was because they had the patronage of the then Minister of Finance Tun Daim Zainnuddin who earlier on did not assist the previous shareholders but instead told them bluntly that the Federal Government could not pay when asked to do so. The present shareholders with the assistance of the then Minister therefore earned huge gains out of the idea of Dato' Fawziah. Such gains came about as a consequence of abuse of powers by the then Minister in preferring to help the present shareholders when earlier on the previous shareholders were not helped despite requests.

[88] We have perused the evidence adduced. No one made any allegation that he or she was compelled by the situation to sell his or her shares in STKG, the then name of the appellant, to the present shareholders. In fact Dato' Fawziah's own words in her letter of 7 February 1995 to the then Minister of Finance wrote that as a businesswoman 'I regarded the take-over purely as a business proposition between the parties concerned'. No witness came to testify that the suspension of the toll collections was engineered by the present shareholders of the appellant or by the then Minister in order to take over the business of the appellant. The relevant persons including the then Finance Minister were never called to testify. They were not given any opportunity to state their versions of the event. No doubt a 'denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affairs of others to complain.' (see: *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697). But in this case those persons referred to in the remarks by the Court

of Appeal are strenuously complaining as indicated by their applications to intervene. In any event it was not necessary at the trial stage since the case of the respondent was premised on an entirely different footing. It was only at the appeal stage and particularly due to the main judgment of the Court of Appeal that the need for them to state their versions became quite apparent. But the Court of Appeal did not seem to have realized that need oblivious of what was said by the Supreme Court in *Sundram v Arujunan & Anor* [1994] 3 MLJ 361 at p 370:

> The third point we should like to consider, may be conveniently described as the natural justice point. In our view, it was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motor cycle and the other motor cycle, without hearing the rider of the other motor cycle. Indeed, as we have mentioned, at the outset, he was never cited as a party in the suit or even called as a witness, and no explanation had been vouchsafed to the trial court for this glaring omission. There was, therefore, a clear breach of the rule of natural justice embodied in the maxim 'audi alteram partem'...

[89] Correspondences exchanged do not also portray an abuser-victim situation. The other previous shareholders of the Appellant were not mere country yokels. They were experienced corporate personalities and established statutory bodies such as Tabung Haji. In fact the other previous shareholders of the appellant were not even parties to the suit. Surely there would have been avalanche of protests written if they had been oppressed. Subsequent payments made by the Federal Government and DBKL were given with explanations. But the way the Court of Appeal in the main judgment put it was as though those payments were dished out without any sense of accountability and according to the whims and fancies of the then Minister of Finance. These remarks reflected such a mood:

> It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals — to profit them — instead of a wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.
>
> ...
>
> In short, STKG which was bought by Metro Juara for a mere RM97.5m was within a year paid or pledged to be paid to Metramac a sum of RM756.7m even before undertaking the works under the second concession agreement.

[90] The total sum RM97.5m paid to the previous shareholders far exceeded the initial sum of RM65m invested. In other words they recovered the sums invested plus some profit which might not have been realized due to the suspension of the toll collection arising from the public demonstration against it. In any event at that point in time Dato' Fawziah, her mother and the previous shareholders had an alternative cause of action open to them to seek legal remedy and was not obliged to accept the offer by the present shareholders of the appellant. They also had the benefit of having

A the services of legal advisors. Yet finally the offer by the present shareholders of the appellant was accepted. It could not therefore be said that they were under economic duress at the time of sale as erroneously found by the Court of Appeal.

[91] Thus the scenario painted by the learned judges in the main judgment came
B about from their own inferences and imagination. Sadly, reading objectively the main and the supplementary judgments one cannot avoid the sense that at the outset the learned judges had the preconceived minds that the primary issue was about the powerful (Goliath) taking advantage of the weak (David). They seemed to believe without due regard to the evidence adduced that there was an arrangement concluded
C between the present shareholders of the appellant, the then Minister of Finance on behalf of the Federal Government and DBKL to ensure that the appellant would profit from the acquisition of the shares from the previous shareholders of the appellant. Hence, the Court of Appeal was all set to uncover a perceived 'scandalous state of affairs'. In our view it was their inferences and imagination that took the centre stage leaving the evidence adduced on the back seat. With respect we find that
D the Court of Appeal went on a frolic of its own.

[92] Obviously it was a case of striking at those persons who had no opportunity to defend themselves under a cover of judicial performance. A reminder is thus apposite that it 'can cause great unfairness to third parties if judges make findings of
E fact or comments which pay no regard to this matter. As a general rule, it is inappropriate, and often unfair, for a judge, in reasons for judgment, to make an unqualified adverse finding concerning someone who is not a party to litigation and who has had no opportunity to answer the allegation in question... Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment.
F Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.' (see *Aspects of Judicial Performance* by Murray Gleeson AC, Chief Justice of Australia).

[93] A plain private claim for breaches of contract and express trust was turned into
G a kind of public interest litigation by the learned judges of the Court of Appeal without much push from the respondent. Indeed the allegations in the main judgment of patronage, abuse of power and economic duress could only have come in our view from the allegations inter alia of 'pressure to sell' the shares, receipt of 'instruction' from Tun Daim and Metro Juara 'not foolish in offering' made in the submissions of counsel for the respondent in the Court of Appeal and not as pleaded
H by the respondent. Unfortunately the Court of Appeal in its main judgment seems to have swallowed those allegations of counsel hook, line and sinker. The basic principle of law that a party is bound by its pleadings was ignored. The proper approach should have been to 'scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having
I strict regard to the issues' (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145). It is also useful to remind judges and judicial arbiters that judgment should be ''pronounced upon the law and the facts of the case, and in discharging this very responsible duty, the judge publicly, in open court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or advertising to the various parts of the

evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged' per Lord Shaw in*Scott v Scott* [1913] AC 417 at p 472.

[94] Hence, considered objectively, we find that there was no basis for the Court of Appeal to make the remarks and findings that there were economic duress, patronage, abuse of governmental positions and powers in complete disregard to taxpayers' money and misappropriation of funds. It is unfortunate that the Court of Appeal made the remarks and findings purportedly based on 'contemporaneous documents and from the circumstances, oral and documentary evidence, all the independent evidence on record and record of appeal' without properly adverting to any of them. Further, gleaned from the exceptional strong and emotive language used particularly in the main judgment it is our view that a reasonable person would be persuaded to conclude that 'there was a real danger of bias on the part of the relevant members' of the Court of Appeal 'even though unintentionally, in the sense that they might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of' appellant.

[95] The remarks and findings were primarily directed against third parties who were not parties to the suit. Learned counsel for the respondent contended that such remarks and findings did not affect the fairness of the proceeding and its result. For the appellant it was argued that the appellant was found 'guilty by association' with the third parties.

[96] With respect we are inclined to agree with the learned counsel for the appellant. The remarks and findings may appear to have been directed to third parties. But the consequence of those remarks and findings fell upon the appellant. The reason is that the Court of Appeal rolled up the third parties with the appellant and that the appellant was assumed as the ultimate beneficiary of the actions and conduct by the third parties. In fact upon reading those remarks and findings one would be inclined to come to a conclusion that the appellant was 'punished' for the purported misdeeds by the third parties. This summation is borne out of the remark in the main judgment which reads:

> Assume for a moment that the defendant's present shareholders are mounting this challenge in the name of the defendant. Assume that they are entitled to do so — which is not the law. Even so, they must come to court with clean hands. But they do not. They are the ones who misappropriated the defendant's property — the RM32.5m. They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[97] The nexus of the remarks and findings to the outcome of the appeal before the Court of Appeal is therefore quite glaring.

[98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence 'yet they 'make use of

injudicious, unfair and extravagant language' in such extreme, outspoken and unbalance terms in that they were 'out of all proportion to or not commensurate with the circumstances before the court' and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its arguments were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal.' In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

[99] Having said the foregoing there is still the contention that despite the remarks and findings in the main judgment, the decision of the Court of Appeal should be maintained since there is the supplementary judgment to support it.

[100] With respect we find that all the learned judges of the Court of Appeal spoke with one mind. The issue of severing the impugned remarks and findings in the main judgment does not arise. Their own statements on record indicate that position. In particular his Lordship Zulkefli Makinudin JCA said that he 'had read the judgment in draft of my learned brother Gopal Sri Ram JCA and fully agree with the views expressed and all the orders made by his lordship on the said two appeals before us' and that 'the legal issues arising from the above mentioned factual circumstances have been comprehensively dealt with by my learned brother Gopal Sri Ram JCA in his judgment.' His Lordship Hashim Yussof JCA expressed his agreement on what were said in the main judgment. In any event we find that even the remarks as identified in the supplementary judgment are equally unnecessary and unsupported by the evidence adduced. For instance, the finding in the supplementary judgment that it was due to the commitment by DBKL to compensate 'STKG in principle, estimated at RM764m, explains why UEM/Metro Juara bought over STKG on short notice and without due diligence' implies that there was an unhealthy and hidden arrangement between the present shareholders of the appellant and DBKL to the prejudice of the respondent. However, the evidence adduced could not be said to irresistibly support such a conclusion.

[101] Hence for the reasons we have stated we are of the view that the decision and judgments of the Court of Appeal cannot stand the test of real danger of bias. We would therefore answer Question 3 as posed in the affirmative. The consequence is that the decision and judgments of the Court of Appeal are therefore set aside.

[102] Having come to the foregoing conclusion we need to address whether to remit the matter back to the Court of Appeal or we should consider and review the findings of the learned High Court judge bearing in mind the materials before us.

[103] After considering the arguments advanced before us we are of the view that remitting this matter to the Court of Appeal will be unnecessary and inappropriate in the circumstances. The High Court had made findings of fact which this court would thus be as able as the Court of Appeal to decide on the issues of law involved (see *T v Secretary of State for the Home Department* [1995] 1 WLR 545; *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353). Further, remittal means additional costs

and delay involved to the prejudice of both parties. Meanwhile, it is not unheard of for this court, after having ruled that the decision of the lower court was a nullity, to proceed to make the necessary orders as to prevent injustice without having to remit a matter to the lower court (see *R Rama Chandran v The Industrial Court of Malaysia & Anor*). We would therefore proceed to evaluate the materials before us to determine whether the decision of the High Court judge could be sustained. In other words, this court has to consider whether the High Court was correct in finding:

(a) that the appellant is liable for breach of contract which would include the question on the enforceability of the various agreements relevant to the parties and dealt with by the Court of Appeal;

(b) that cl 8 of the Signage Sub-Licence Agreement is a penalty and thus the appellant is not liable to pay the sum of RM65,182,920 but only for damages to be assessed;

(c) that the agreement in respect of future contracts is void and thus the question of trust account as contained in cl 10 of the restructure sale agreement does not arise; and

(d) that the counterclaim of the appellant should be dismissed.

[104] No doubt the issue of liability under the agreements was not posed before us. But since we have set aside the decision of the Court of Appeal and that we are proceeding to review the matter afresh it is only appropriate that we should consider albeit briefly the issue which in fact was also submitted to us. We make it clear that we are not adding any issue or question posed before us. We take this approach in view of the decision we have made on the status of the decision of the Court of Appeal.

[105] Further, in carrying out the foregoing exercise we would ipso facto be dealing with Questions 2 and 3 as posed before us. We also bear in mind the contention of learned counsel for the respondent that notwithstanding our decision on Question 3 the remaining Questions 1 and 2 should be considered on their own since they involved issues of law premised only on limited relevant facts.

ENFORCEABILITY AND LIABILITY UNDER THE VARIOUS AGREEMENTS

[106] We have carefully scrutinized the reasons given by the learned High Court judge in finding liability for breach of contract against the appellant. We have also taken time to deliberate on the contentions advanced before us by learned counsel for the appellant on this point. With respect we have not been persuaded.

[107] We are entirely in agreement with the summation by the learned High Court judge when he said this:

> A contract is essentially a bargain and in the absence of any vitiating elements such as misrepresentation or fraud, the court will enforce it. The defendant (the appellant before us) cannot now claim that the directors of the plaintiff (the respondent before us) had acted in bad faith in not declaring their interest in the plaintiff's company or the existence of the

agreements before Metro Juara signed the Share Sales Agreement with the shareholders (including the directors of the plaintiff) of the defendant (then known as Syarikat Teratai on 23 January 1991. In proceeding to enter into the Signage Agreement with the defendant in 1990, the plaintiff was in fact exercising its right to the advertising right under cl 2.2 of the Sale Agreement it had entered into earlier in March 1988 which it had every right to do so.

failing to honour its obligation under the Signage Sub-Licence Agreement, the defendant had committed a breach to which the plaintiff would have a right to claim damages.

[108] Hence, we affirm the finding of liability of the appellant as found by the learned High Court judge.

Question 2:

Whether the test adopted by the Court of Appeal, in determining whether cl 8 of the Signage Agreement is a stipulation by way of a penalty and/or a sum named in the contract for purposes of s 75 of the Contracts Act 1950, is the correct test and/or is exhaustive?

[109] This question arises in relation to cl 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amendment Agreement vis-a-vis s. 75 of the Contracts Act 1950. To put it in term of a given sum it is whether s 75 applies to the sum of RM65,182,920 as claimed by the respondent calculated pursuant to cl 8 thereof.

[110] The learned High Court Judge held that in failing to honour its obligation under the Signage Sub-Licence Agreement the appellant had committed a breach to which the respondent would have a right to claim damages. He then proceeded to consider whether the respondent was entitled to the compensation under cl 8 of the agreement. He also found that it was common ground that DBKL had committed a breach of the first concession agreement by suspending the right of the appellant to collect toll on 12 September 1990.

[111] Clause 8 of the Signage Sub-Licence Agreement in its unamended form reads:

8 Charges Payable On Cancellation Of Contract

8.1 If the Concession agreement is terminated in any of the following circumstances:

(a) by the company pursuant to Clause 15.3 of the Concession agreement; or

(b) by the Datuk Bandar pursuant to Clause 15.4 of the Concession agreement,

then notwithstanding anything in Clause 1.4, this Agreement shall be cancelled automatically upon such termination becoming effective.

8.2 STKG acknowledges that the Licensee expects to receive revenue during each of the years commencing in 1 January, 1991 and ending on December, 2000 of RM7,797,000. It is agreed that upon cancellation under Clause 8.1 the Licensee shall be entitled to receive following:

(a) If cancellation occurs prior to 1 January, 1991, the following sums:

(i) RM7,797,000 in respect of 1991, and

(ii) The discounted value of RM7,797,000 in respect of each the years 1992 to 2000 applying discount rate of 8% annum

(b) If cancellation occurs on or after 1 January 1991, the following sums:

(i) RM7,797,000 in respect the year in which cancellation occurs (the 'Relevant Year') less any amounts already received by the Licensee and payable to it in respect of that year; and

(ii) the discounted value of RM7,797,000 in respect of each of the years from the Relevant Year to 2000 applying a discount rate of 8% per annum; and

(c) if cancellation occurs in 2000 RM7,797,000 less any amounts already received by the Licensee or due to the Licensee and payable to it in respect of that year, together, in each case with interest at the rate of 9% per annum on the sum payable calculated from the date of cancellation to the date of payment by Datuk Bandar under the Concession agreement.

8.3(a) It is agreed that upon cancellation of this Agreement, a debt shall arise as calculated in accordance with Clause 8.2 and the debt shall be payable by STKG as a result of the cancellation of this Agreement PROVIDED THAT STKG shall only be obliged to make payment of the said debt due to out of moneys recovered from Datuk Bandar pursuant to the Concession agreement and the Licensee shall not take action to recover such debt from STKG except if and to the extent that such moneys have been so recovered by STKG.

(b) To the extent that money recovered from Datuk Bandar pursuant to the Concession agreement or the Licence Agreement are clearly identifiable as payments in respect of cancellation of this Agreement STKG shall pay those sums to Licensee forthwith upon receipt.

(c) To the extent that moneys recovered from Datuk Bandar pursuant to the Concession agreement are clearly identifiable as payments in respect of cancellation of this Agreement then STKG shall pay to the Licensee a sum calculated in accordance with the following formula:

Payment:

R + C – (L + CI + T) x CC TC

where

R means the total compensation claim received from the Government;

C means the amounts of cash held by STKG (plus deposits);

L means the sum of all financial indebtedness to financial institutions;

CI means the sum of all current indebtedness of STKG, being moneys paid on a monthly or immediate basis, but not including claims for cancellation of contracts;

T means all tax payments, due or to become due;

TC means the value if all claims lodged by STKG against Datuk Bandar; and

CC means the value of claims under this Agreement.

[112] Clause 8 was slightly amended with the execution of the Signage Sub-Licence Amendment Agreement on 15 December 1990. The relevant portion of cl 8.1 as amended reads:

8.1 If:

(a) the Concession Agreement or the Licence Agreement or STKG's rights under either of them are, with the consent of STKG, terminated,...; or

(b) STKG terminated this Agreement...:

[113] Indeed the learned High Court judge had failed to appreciate that the relevant clause to consider should be the amended version. The effect of the amendment was basically to amend the triggering point for a claim to arise under cl 8, to include the mutual termination of the first concession agreement or upon the termination of the Signage Sub-Licence Agreement by STKG.

[114] The learned High Court judge held that the compensation provision under cll 8.2 and 8.3 was unenforceable for it contravened s 75 illustrations (d), (e),(f) and (g) of the Contracts Act 1950. Consequently he ruled that the respondent was not entitled to be compensated in accordance with those clauses.

[115] Unfortunately the learned High Court judge did not elaborate his reason other than quoting the illustrations as given in the statutory provision.

[116] In the impugned main judgment of the Court of Appeal it was held inter alia that there was a breach of contract in that the Signage Sub-Licence Agreement as amended was breached hence prima facie s. 75 would be applicable. However, the 'formula set out in the amended cl 8 is not 'a sum named in the contract'. It follows that s 75 does not bite on that count'. His Lordship Gopal Sri Ram JCA did 'not think that the cl 8 formula is a penalty'. He went on to say this:

> To be a penalty it must hold the other contracting party in terrorem. In other words it must be extortionate. So, a clause in a contract for the sale and purchase of property that enables the vendor to forfeit a non-extortionate deposit is not a penalty and does not come within s 75.'... In my judgment, there is nothing extortionate about the cl 8 formula. It is not, objectively speaking, directed at ensuring that the defendant performs its obligation under any contract it had with DBKL. It merely comes into operation upon the happening of a contingency, namely, the mutual termination of the first concession agreement. That event did happen and as a result the formula has to be used to calculate the losses suffered by the plaintiff. There is another reason why s 75 does not apply to the facts of this case. Section 75 is concerned with the question whether a sum named in a contract or a stipulation in a contract is a genuine pre-estimate of the damages that the innocent party may suffer in the event of a breach. It has no application to an action for a simple debt, although it does apply to extortionate claims of interest on a debt. In my judgment, cl 8 creates a debt in the plaintiff's favour.... We have before us a commercial contract. And, as I have already said, the defendant's liability to the plaintiff was contingent upon the first concession agreement being mutually terminated. That event having happened, what the plaintiff was entitled to recover from the defendant were not damages but was a debt.... As I have already said, the cl 8 claim is in truth an action to recover a debt owed by the defendant to the plaintiff. That debt is the sum of RM65,182,920 arrived at in accordance with the cl 8 formula.

[117] Learned counsel for the respondent before us submitted a similar argument that there was a mutual termination of the first concession agreement hence there was no application of s 75 which only addresses when there is a unilateral breach of contract.

[118] With respect we are inclined to agree with the approach adopted by the learned judge in the impugned main judgment of the Court of Appeal in that the contract in issue should be the Signage Sub-Licence Agreement as amended. Indeed there was a breach of that contract by the appellant. We note that the High Court judge premised his finding of liability against the appellant on the unamended Signage Sub-Licence Agreement. However, since the effect of the amendment was only related to the triggering point his finding on liability should not be affected. The remaining issue therefore is whether the damages computed in accordance with the formula in cl 8 is caught by s 75 of the Contracts Act 1950.

[119] Section 75 reads:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Illustrations — (d), (e) (f) and (g):
>
> (d) A gives B a bond for the repayment of $1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the court considers reasonable.
>
> (e) A who owes money to B, a moneylender, undertakes to repay him by delivering to him 10 gantangs of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 gantangs. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.
>
> (f) A undertakes to repay B a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.
>
> (g) A borrows $100 from B and gives him a bond for $200 payable by five yearly instalments of $40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

[120] In this country the distinction between liquidated damages and penalties is no longer significant in view of s 75 of the Contracts Act 1950 (see *SS Maniam v The State of Perak* [1957] MLJ 75; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89). But we had allowed Question 2 to be posed at the leave application stage since we were then considering the point in relation to the impugned judgments of the Court of Appeal in this matter. Since they have been set aside the complaint by the appellant that the Court of Appeal applied the wrong test for s 75 is no longer relevant. We are now left with the task of reviewing whether the learned High Court Judge was correct in his conclusion on cl 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amending Agreement.

[121] Whether a provision in an agreement comes within the ambit of s 75 is one of construction. And although s 75 has done away with the significant distinction between penalty and liquidated damages under common law some of the pronouncements of the principles in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co Ltd* [1914–15] All ER Rep 739 are still relevant in considering whether a provision comes within the ambit of s 75. The House of Lords in that case speaking through Lord Dunedin at pp 741–742 said this:

> In both of these cases many of the previous authorities were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:
>
> (i) Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> (ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage: *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489.
>
> (iii) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach: *Public Works Comr v Hills* [1906] AC 368; 75 LJPC 69; 94 LT 833 (PC); 17 Digest (Repl) 149, 490 and *Webster v Bosanquet* [1912] AC 394; 81 LJPC 205; 106 LT 357; 28 TLR 271 (PC); 17 Digest (Repl) 156, 532.
>
> (iv) To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:
>
> (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach — illustration given by Lord Halsbury LC, in the *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (H)L; 17 Digest (Repl) 149, 489.
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid: *Kemble v Farren* [1829] 6 Bing 141; 3 Moo & P 425; 7 LJO SCP 258; 130 ER 1234; 17 Digest (Repl) 157, 546. This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that, when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable — a subject which much exercised Jessel MR in *Wallis v Smith* [1882], 21 Ch D 243; 52 LJ Ch 145; 47 LT 389; 31 WR 214 (CA); 17 Digest (Repl) 77, 14 — is probably more interesting than material.
>
> (c) There is a presumption (but no more) that it is a penalty when:

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties: *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489 per Lord Halsbury; *Webster v Bosanquet* [1912] AC 394.

[122] Further, it is trite law that the burden to prove that a specified sum or stipulation is a penalty is upon the party sued for its recovery (see *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428). And in our view the mere use of formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s 75. It is a matter of construction premised in its 'terms and inherent circumstances, judged of as at the time of the making' of the agreement, not as at the time of the breach. In other words it 'depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.' (see *Law v Redditch Local Board* [1982] 1 QB 127).

[123] The Indian cases took a similar approach. In the case of *PK Achuthan v State Bank of Travancore, Calicut* AIR [1975] Ker 47, a case cited in the main judgment of the Court of Appeal, it was said thus:

The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty.

[124] Having therefore considered objectively cl 8 as a whole bearing in mind, inter alia, its 'terms and inherent circumstances, judged of as at the time of the making' of the agreement, not as at the time of the breach, we are in agreement with the learned High Court judge that applying s 75 it is a penalty in nature in that the said clause constitutes a threat held against the appellant 'in terrorem' more in the nature of a security extended to the promisee to the effect that the agreement would be performed and not a genuine pre-estimate of the damage which is likely to be suffered by the respondent in the event of such breach.

[125] We are also inclined to agree with the learned counsel for the appellant that the formula, based on the respondent's annual expected revenue of RM7,797,000 in

order to come up with the total claim of RM65,182,920, is not a genuine pre-estimate damages that would be suffered by the respondent in the event of a breach of its contractual obligations by the appellant. Computing the annual expected revenue itself involves many variables and other factors, including the method, necessary to be taken into account. In other words the sum payable is extortionate in that it is unreasonably high thus requiring the court to intervene by way of assessment to come to a reasonable compensation payable. Indeed the fact that there is only the payment of an annual licence of RM1,000 by the respondent in return for an annual estimate revenue of RM7,797,000 does make the argument attractive in that the sum claimed is unreasonably disproportionate to the nature or extent of the injury. However, we are also mindful to uphold the principle of sanctity of contract and the absence of any evidence indicating that at the time of entering into the contract the parties were not on equal footing. Hence, we do not propose to give any weight to the foregoing argument.

[126] The usage of the phrase 'a debt shall arise as calculated in accordance with cl 8.2 and the debt shall be payable by STKG as a result of the cancellation of this agreement' does not ipso facto rule out the probability that the sum payable can be a 'sum named in a contract' for the purposes of s 75. It is a matter of construction of the relevant terms with due regard to the inherent circumstances at the making of the agreement.

[127] Accordingly, for the above reasons we are in agreement with the conclusion by the learned High Court judge that 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the Replacement Agreement any advertising rights that may have been granted under the Replacement Concession Agreement' which the appellant 'signed within the ambit of cl 1.4 of the Signage Sub-Licence Agreement'.

[128] As alluded to earlier in view of our answer to Question 3 we do not have to answer Question 2 in its original context. But even if we have to it is obvious from our above reasons that the answer would have to be in the negative.

Question 1:

Whether the creation of a trust by a company amounts to an illegal reduction of its capital?

[129] Before the High Court the issue was on the claim for account and payment of income earned on 'future contracts'. It was premised on cll 9 and 10 of the restructure sale agreement.

[130] The learned High Court judge held that the agreement 'with respect to the 'sale' of 'future contracts' to the respondent 'was void for uncertainty.' He gave his reasons, inter alia:

(i) that it was incapable of being identified what constituted 'such projects or works other than such projects relating to the Concession Agreement' that would oblige the appellant to sub-contract to the respondent;

(ii) that there was no mechanism provided for in the restructure sale agreement for making such determination; A

(iii) that there was no indication of how long the obligation would subsist;

(iv) that there was no term or price provided for each sub-contract; and

(v) that it was not clear if there would be any consideration given for the sale of the future contracts. B

[131] Hence, the imposition of an obligation to set up a trust account for the benefit of the respondent as provided for under cl 10 was ruled to be no longer arising since the provision relating to 'future contracts' was ruled to be void for uncertainty as it did not meet the requirement of s 30 of the Contracts Act 1950. C

[132] On appeal to the Court of Appeal the finding of the High Court judge was reversed. The Court of Appeal was of the view that cl 9.5 of the restructure sale agreement created an express trust and that s 30 of the Contracts Act 1950 did not apply. On the requirement of the three certainties in the creation of an express trust his Lordship Gopal Sri Ram JCA said this: D

> There are two points that arise out of this head of the plaintiff's claim. The first concerns the grounds on which the learned judge rejected it, namely that it is flawed by uncertainty and by the want of consideration. Second, there is the reason advanced by the defendant, in addition to those given by the judge, namely, that the basis for the claim simply does not exist. I will deal with the latter first. But, some background is necessary. E
>
> This part of the plaintiff's claim is directed at the second concession agreement. It is the plaintiff's case that the second concession agreement is a 'future contract' within cl 9.4. The restructure sale agreement in cl 1.1 defines 'future contract' as any contract relating to any project or the construction of any works entered into or to be entered into with the Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement. F
>
> Much time and effort has been spent in oral and written argument on the learned judge's finding that cl 9.4 was void for uncertainty as a matter of contract by virtue of s 30 of the Contracts Act 1950. With respect, I think that the target has once again been missed. Look at cl 9.5 again and see what it actually does. It creates an express trust. The actual words it uses are 'the future contracts shall be held by the vendor on trust for the purchaser (Emphasis added). Once an express trust is created, there is no role for the law of contract. The real question or target that ought to have been addressed in the submissions of counsel before the High Court should have been whether the trust created under c 9.5 is certain. And upon that question s 30 which only applies to contracts has no relevance whatsoever. G H
>
> The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v Knight* [1840] 49 ER 68. There it was held that for a trust to be certain three requirements must be fulfilled. First, there must be certainty of intention. Second there must be certainty of subject matter: both in terms of the corpus and the beneficial interest. Third, there must be certainty of the objects of the trust. A trust is void if there is uncertainty in any of these three elements. I
>
> In my judgment, on the facts of the present case the first and third requirements are amply satisfied. Let me take the first requirement. The words 'shall be held by the vendor on trust for the purchaser' are imperative, not precatory. They establish beyond a reasonable doubt

A an intention on the part of the defendant (described as 'the vendor' in cl 9.5) that it shall be constituted a trustee for the plaintiff (see *Hameeda Bee v Mrs P Seenivasagam* [1950] MLJ 267).

...

B After very careful consideration of the terms of the restructure sale agreement, I have come to the conclusion that the trust created under cl 9.5 is not void for uncertainty. My reasons are these. In the first place, the subject matter of the trust is clearly identified by the restructure sale agreement itself. As I have already said, cl 1.1 clearly defines what a future contract is. At the risk of repetition, it says that 'future contract' means 'any contract relating to any project or the construction of any works entered into or to be entered into with the C Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement'. So, if and when the defendant secures a contract with DBKL or any other person for a project, that contract is immediately charged with a trust. I cannot therefore see how much more clearly trust property may be identified. In the second place, the defendant had a contingent, and I would venture to even say a vested, right to secure a contract with DBKL in the form of the second concession.

D

[133] Hence, Question 1 in its present form was allowed at the leave stage premised on the impugned main judgment of the Court of Appeal. Anyway as indicated earlier on learned counsel for the respondent took the position that this Question 1 should be considered on its own even if we have answered Question 3 in E the affirmative.

[134] However, in view of our answer to Question 3 and our decision to set aside the main and supplementary judgments of the Court of Appeal it is thus essential that we should review the decision of the learned High Court Judge on the issue of F trust vis-a-vis the claim of the respondent.

[135] Relying on cll 9 and 10 of the restructure sale agreement it is the case for the respondent as prayed for that the appellant 'holds the said profits, monies and benefits received and to be received on trust for the benefit of the respondent under G the new Concession Agreement and the said contracts'.

[136] Although the learned High Court judge might have erred in applying s 30 of the Contracts Act 1950 when considering cll 9.5 and 10 of the restructure sale agreement in term of certainty, we are of the view in the same way as the Court of H Appeal that determining the elements of certainty in the purported trust created by those clauses is still necessary. Essentially therefore it is an exercise to determine whether all the three elements of certainties in the creation of an express trust, namely, intention, subject matter and object, are present.

[137] Certainty of intention is clear from the words of the cl 9.5 and so too the I object being the respondent. It is the subject matter of the purported express trust that poses some difficulties.

[138] 'Future contracts' has been defined in cl 1.1 of the restructure sale agreement as 'any contract relating to any project or the construction of any works entered into

or to be entered into with the Dato Bandar Kuala Lumpur or any other person, *other than such projects or works relating to the first concession agreement*'. (Emphasis added.)

[139] It is the pleaded case of the respondent that the Replacement Concession Agreement is a replacement of the first concession agreement. In fact the recital as well as cl 1.4 of the Replacement Concession Agreement is clear in that it is a replacement or substitution for the first concession agreement.

[140] If therefore the Replacement Concession Agreement is a replacement of the first concession agreement there is merit in the submission that projects or works relating to it could be excluded due to the definition of 'future contracts' as given. As the subject matter of the intended trust are the 'future contracts' but that the projects or works relating to the Replacement Concession Agreement are not within the definition of 'future contracts', it follows that there is no question of the Replacement Concession Agreement being the subject matter of the trust upon which the respondent premised its claim against the appellant.

[141] Accordingly we would say that the learned High Court judge was right in concluding that there was no basis for the claim under cl 9 of the restructure sale agreement.

[142] Further, due to the uncertainty of what projects and works should come under the purported trust there is therefore uncertainty in the subject matter of the trust. This doubt is not helped by the assertion of learned counsel for the respondent in answer to a question from the Bench that the Replacement Concession Agreement is not a replacement for the first concession agreement. Such contention gives the impression that the Replacement Concession Agreement is within the definition of 'future contracts'. That seems to be also the view of the Court of Appeal in its main judgment. Yet at the same time it was also submitted that the trust was created in 'consideration of the respondent taking over all the liabilities and indemnities of STKG (now the appellant) in relation, to its non-concession business,' and other liabilities and warranty. It was also submitted that cls. 9.4 and 9.5 were 'created merely to ensure that STKG's status as a one project company would not be jeopardized by the influx of future non-toll business, which will instead be transferred to the respondent.' This last preceding statement may be correct if not for the definition of 'future contracts' which only excluded projects and works relating to the first concession agreement.

[143] There is therefore confusion as to what actually the respondent is claiming under the purported express trust. If indeed the Replacement Concession Agreement is within the definition of 'future contracts' then there is merit to say that the appellant not only would be obliged to subcontract to the respondent all the projects and works under the Replacement Concession Agreement but it would also be holding on trust all profits and monies received by it in relation to the Replacement Concession Agreement. That in our view makes no business sense at all. It would tantamount to the appellant spending its own capital to generate incomes only to be subject to an express trust in favour of the respondent. There is therefore merit to the assertion that it amounts to an enslavement of the appellant.

[144] There is therefore ambiguity in the subject matter of the purported express trust intended under cl 9.5 of the restructure sale agreement and is thus void for uncertainty.

[145] For the above reasons it is thus unnecessary to answer Question 1.

[146] At any rate accepting the argument that the Replacement Concession Agreement comes within the definition of 'future contracts' the actual result of the purported express trust would tantamount to nothing less than depletion of the share capital of the appellant since it is expected at its own costs to get the projects and works under the Replacement Concession Agreement and subcontract them to the respondent and that all profits and monies received in relation to the Replacement Concession Agreement would be held on trust for the respondent. Nothing would be earned by the appellant. In our cursory view such purported express trust would obviously be a scheme that could amount to an illegal reduction of capital without any court's sanction and the payment of profits without declaring any dividend. Sections 64 and 365(1) of the Companies Act 1965, as amended, make clear the prohibitions and the prerequisites and are thus relevant. If on the facts and circumstances of this matter as canvassed our answer to Question 1 would therefore be in the affirmative.

CONCLUSION

[147] For completeness we would therefore make the following orders, namely:

(a) that the main and supplementary judgments of the Court of Appeal cannot stand the test of real danger of bias. We would therefore answer Question 3 as posed in the affirmative. The consequence is that the main and supplementary judgments of the Court of Appeal are set aside. It follows that the decision of the Court of Appeal is therefore set aside;

(b) that our answer to Question 2 is in the negative. The respondent would not be able to claim the sum computed in accordance with the formulae given in cl 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amendment Agreement. However, 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the Replacement Concession Agreement any advertising rights that may have been granted' under such agreement which the appellant 'signed within the ambit of cl 1.4 of the Signage Sub-Licence Agreement';

(c) that the claim pursuant to cll 9 and 10 of the restructure sale agreement is dismissed. Further and if necessary our answer to Question 1 is in the affirmative; and

(d) half costs to the appellant here and below since the appeal is only partially allowed. Deposit to be refunded to the appellant.

[148] My learned brothers, the Chief Justice and Abdul Hamid Mohamad, Alauddin Mohd. Sheriff and Nik Hashim Nik Abd Rahman FCJJ have read this judgment in draft and have expressed their agreement with it.

Abdul Hamid Mohamad FCJ:

[149] It started with Fawziah Holdings Sdn. Bhd. ('Fawziah Holdings') suing Metramac Corporation Sdn. Bhd. ('Metramac Corporation') principally for damages for breach of contract in the High Court of Kuala Lumpur (Commercial Division) in Civil Suit no. D5-22-110-1995. The High Court allowed part of the claim of Fawziah Holdings and dismissed the others. Both Fawziah Holdings and Metramac Corporation appealed against the High Court judgment to the Court of Appeal. Fawziah Holdings' appeal was registered as Civil Appeal No W–02–1009–2003. Metramac Corporation's appeal was registered as Civil Appeal No W–02–1013–2003.

[150] The Court of Appeal allowed Fawziah Holdings' appeal but dismissed Metramac Corporation's appeal. Metramac Corporation applied for leave to appeal to this Court against both the judgments. The application arising from W–02–1009–2003 was registered as 08–8–2006(W) while the application arising from W–02–1013–2003 was registered as 08–9–2006(W). Leaves to appeal were granted. Metramac Corporation then filed the notices of appeal which were registered as 02–19–2006(W) and 02–20–2006(W) respectively.

[151] The judgment of the Court of Appeal ([2006]1 MLJ 505), in particular, the judgment of Gopal Sri Ram JCA contained statements against Tun Daim and Tan Sri Halim Saad which they found to be objectionable. Tun Daim and Tan Sri Halim Saad were neither parties nor witnesses in the suit in the High Court or in the appeals in the Court of Appeal. They each filed an application to intervene in Metramac Corporation's applications for leave to appeal (08–8–2006(W) and 08–9–2006(W)) and to have the offensive statements expunged. Tun Daim's application in 08–8–2006(W) is in encl 9(a) while his application in 08-9-2006(W) is in encl 7(a). Both are the same.

[152] Tan Sri Halim Saad made a similar application in 08–8–2006(W), in encl 13(a).

[153] This court on 7 March 2006 granted both Tun Daim and Tan Sri Halim Saad leave to intervene in the appeals for the purpose of expunging the alleged offensive statements. The main prayers in their applications, ie, to expunge the allegedly offensive statements were fixed for hearing together with the hearing of the appeals by Metramac Corporation (02–19–2006(W) and 02–20–2006(W)).

[154] In the mean time, Tun Daim applied to have encls. 7(a) amended and to have some documents exhibited in Fawziah Holdings' affidavits expunged —

encl 30(a). Similar application was made by him in respect of encl 9(a) — encl 55(a). Tan Sri Halim Saad also made an application to expunge the same documents. His application is in encl 81(a).

[155] As we had sorted out the side issues without having to make decisions and orders, I do not think that it is necessary to say anything about them. I shall go straight to the main issue ie, that of expunging the allegedly offensive statements.

JURISDICTION OF THE COURT

[156] Actually, jurisdiction of this court to make an order to expunge offensive statements is not an issue before us. First, this court in allowing Tun Daim and Tan Sri Halim Saad ('the interveners') to intervene in these appeals for that purpose, was already satisfied that this court had the threshold jurisdiction to make such an order.

[157] Secondly, this court has repeatedly held that it has the inherent jurisdiction 'to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court' — see *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; *MGG Pillai v Tan Chee Yionn* [2002] 2 MLJ 673 and *Allied Capital Sdn Bhd v Mohd. Latiff bin Shah Mohd. & Another Application* [2005] 3 MLJ 1.

[158] Thirdly, at least on two occasions, courts in this country had expunged remarks made in a judgment. The first is Insas Bhd. & Anor v. Ayer Molek Rubber Co. Bhd. & Ors. [1995] 2 MLJ 833 (FC). The other case is Phileo Promenade Sdn. Bhd. & Anor v. Premier Modal (M) Sdn. Bhd. [2003] 2 MLJ 159 (CA).

[159] In *Insas Berhad* or better known as the '*Ayer Molek Case*' the Federal Court expunged offensive remarks made by the Court of Appeal in its judgment against the High Court, the applicants and their counsel. Jurisdiction was not an issue in that case and the Federal Court did not even make any mention of it.

[160] In *Phileo Promenade*, the Court of Appeal expunged three paragraphs from the judgment of the High Court. In that case too, jurisdiction of the court, ie, the Court of Appeal, was not an issue and no mention was made in the judgment of the Court of Appeal on the question of jurisdiction. It was accepted by all that the court had the jurisdiction to do so.

[161] Fourthly, in this case too, learned counsel for Fawziah Holdings (the respondent) did not raise any objection to the application on ground of want of jurisdiction. It was only the learned counsel for the interveners who, out of caution, submitted on the question of jurisdiction of this court to make the expunging order.

[162] The Supreme Court of India too has on occasion exercised its inherent jurisdiction to expunge comments of the lower courts. An example is the case of *State of Uttar Pradesh v Mohd. Naim* [1964] AIR SC 703. That case was also cited in *Insas Bhd*and *Phileo Promenade*.

[163] In the circumstances, I do not think it is necessary to dwell at length on the issue of jurisdiction of this court to make the expunging order. Suffice to say that this court has the jurisdiction to do so, if circumstances warrant it to do so.

THE TEST

[164] A number of judgments of the Supreme Court of India were referred to us. They are *State of Uttar Pradesh v Mohd. Naim*, *AM Mathur v Pramod Kumar Gupta & Ors* [1990] 2 SCC 533; *State of Madhya Pradesh & Ors v Nandlal Jaiswal & Ors* [1987] 1 SCR 1; *V Sujatha v State of Kerala & Ors* [1994] Supp (3) SCC 436. In fact passages from the same cases have been reproduced in the judgments of this court in *Insas Berhad*and in the judgment of the Court of Appeal in *PhileoPromenade*. I do not think it is necessary to reproduce them again. These cases talk about the need for judicial restraint, remind judges not to misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties and witnesses, advise judges 'not to use strong and carping language while criticising the conduct of parties and witnesses. They (judges) must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and resulting in injustice' — per BN Bhagwati CJ.

[165] In *State of Uttar Pradesh v Mohd. Naim*, SK Das J, delivering the judgment of the court said that in such cases 'it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct'.

[166] I agree that the sensible approach for this court to take is first to consider whether the statements, on the face of it, are offensive, objectionable, disparaging, unjust, unjustified and so on. If so, then the court should consider the three points mentioned above. However, there may be other factors arising from the circumstances of the case that may be relevant.

[167] So, we have to look at the statements that have become the subject matter of this application. Both Tun Daim and Tan Sri Abdul Halim Saad have reproduced the parts of the judgments objected to by them in their affidavits in support of their respective application. They are too long to be reproduced. Suffice for me to identify them by their paragraph numbers. They are paras 11, 13, 16 and 34 of the judgment of Gopal Sri Ram JCA and para 35 of the judgment of Zulkefli Ahmad Makinudin JCA.

[168] Tan Sri Halim Saad objected to paragraphs (at times part of) 10, 11, 12, 13, 15, 16, 17, 18 and 34 of the judgment of Gopal Sri Ram JCA and part of para 32 of the judgment of Zulkifli Ahmad Makinudin JCA.

[169] We have before us a case where the unwarranted and disparaging statements were made by the learned judge in his judgment where Tun Daim was neither a party

nor a witness; where he had no opportunity whatsoever to explain or defend himself; where there was no cogent evidence on record to support such statements; where he was neither referred to in the pleadings nor in the judgment of the trial judge; where in the notes of evidence of the trial judge even though his name was mentioned it was inconsequential and where such comments are altogether unnecessary for the learned judge to decide the case, even to arrive at the same conclusion that he did.

[170] Reading those parts of the judgment objected to I have no doubt that, at least some of them are unwarranted and objectionable and should be expunged from the records.

[171] The same applies to Tan Sri Halim Saad's application.

[172] In my judgment, the following statements from the judgment of Gopal Sri Ram (JCA) should be expunged:

Para 13:

> So why pay RM97.5m for the shares of such a company? The answer is simple enough. Anuar Othman and Dato Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin. The events leading to the takeover of the defendant company and subsequent thereto clearly bear this out. For example, look at the confident way in which Metro Juara behaved. Even before the restructure sale agreement was signed on 23 January 1991, Metro Juara wrote to DBKL on 14 January 1991 about recommencing toll collection and re-negotiating the first concession agreement. It would not have written such a letter unless everything had already been put in place.

Para 16:

> You may well ask how all this could have happened without the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals — to profit them — instead of a wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

Para 17:

> For the sake of completeness, it must be mentioned that the RM32.5m mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was stupefying. He said that these two gentlemen had, as shareholders, paid this sum into the defendant's account and were now reimbursing themselves. This answer overlooks the most elementary principle of company law. It is this. The shareholders of a company have no interest, legal or equitable, in the assets of their company. See, *Law Kam Loy v Boltex Sdn Bhd* [2005] 3 CLJ 355.

Para 18:

In this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immoveable is a criminal breach of trust within s 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under s 409. See, *Public Prosecutor v Datuk Harun* [1976] 1 LNS 96; [1977] 1 MLJ 180. I need do no more than quote from the judgment of Chua J in *Tay Choo Wah v Public Prosecutor* [1976] 1 LNS 156; [1976] 2 MLJ 95 where his lordship said:

> The sooner directors realise that *the Companies Act applies to private companies whether family or not the better it is. A company is not a mere puppet of the directors and the people interested in the proper and lawful conduct of the company are not just the directors and the shareholders.* All sorts of people have a legitimate and proper interest in the well-being and preservation of the assets and properties of a company, like creditors and persons having dealings with the company. (Emphasis added.)

I must therefore be forgiven if I were to look askance at learned counsel's rationale for what was done in this case.

Para 34:

They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[173] No part of the judgment of Zulkifli Ahmad Makinudin JCA needs be expunged.

COSTS

[174] The question is, since I am allowing the application to expunge, whether Fawziah Holdings should be penalized with costs of the interveners who, through no fault of theirs, have to incur expenses to intervene in the appeals. On the face of it, it is only fair that they be given their costs. But, to order that Fawziah Holdings pay their costs, there must be some 'fault' on the part of Fawziah Holdings. At the very least, it should be shown that Fawziah Holdings in prosecuting their appeal, had led the learned judge to make those objectionable statements that he had made. I do not think it is fair to penalize Fawziah Holdings with costs if the learned judge, on a frolic of his own, had made those objectionable statements. What part had Fawziah Holdings played in this episode?

[175] I have read the excerpts of Fawziah Holdings' Final Submission and reply in the Court of Appeal which the interveners rely as forming the basis for the learned judge to make the impunged statements. To me the mention of the interveners' names in the contexts are a matter of fact and inconsequential. In no way they can be said to have caused the learned judge to make such comments. What happened here was that the learned judge had gone on a frolic of his own to do so.

[176] It is true that Fawziah Holdings had objected to the applications of the interveners to intervene and had argued against expunging. Their actions is understandable and quite reasonable because it is an attack on a judgment which was in their favour and that they feared of having 'a cut-up' judgment to defend. In any event, even if Fawziah Holdings did not object to the applications, the interveners would have to engage solicitors and counsel and incur legal expenses all the same. It is unfair to the interveners that they have to bear their own costs of making these applications. It is also unfair that Fawziah Holdings have to bear their own costs of defending the judgment of the learned judge. It is even more unfair to make Fawziah Holdings bear the costs of the interveners. All these only reemphasize the serious consequences statements from the bench can have. That is a lesson that all judges should learn.

[177] In conclusion, I would allow these applications and expunge the parts of the judgment of Gopal Sri Ram JCA reproduced earlier. I would make no order as to costs and I would order that the deposits to be refunded to the interveners.

[178] The learned Chief Justice Malaysia, Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, the learned Chief Judge (Sabah and Sarawak) Tan Sri Dato' Richard Malanjum, and my learned brothers Dato' Alauddin bin Dato' Mohd. Sheriff, FCJ and Dato' Nik Hashim bin Nik Ab.Rahman, FCJ have read this judgment and have agreed with it.

Decision and judgments of the Court of Appeal set aside. High Court's finding of appellant's liability affirmed.

Reported by Sally Kee